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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Com Systems, Inc. File No. I-T-C-91-225-TC

Application for *Pro Forma* Involuntary Transfer of Control pursuant to Section 214 of the Communications Act of 1934, as amended

Com Systems, Inc. File No. I-T-C-91-160-TC
Transferor

and

Resurgens Acquisition Corporation
Transferee,

Application for Assignment of International Resale Authorization of Com Systems, Inc. pursuant to Section 214 of the Communications Act of 1934, as amended

MEMORANDUM, OPINION, AND ORDER

Adopted: September 30, 1991; Released: October 7, 1991

By the Chief, International Facilities Division:

1. On July 3, 1991, Com Systems, Inc. (CSI) and Resurgens Acquisition Corporation (RAC) filed the above-captioned application pursuant to Section 214 of the Communications Act, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, requesting authority to assign the certificates of CSI to RAC. The application was put on public notice on July 10, 1991, and no comments were received. On August 28, 1991, CSI filed a letter requesting *pro forma* approval of an involuntary transfer of control due to a foreign bankruptcy proceeding involving the ultimate parent corporations of CSI, OmniCorp International BV and Omni Holdings AG. The letter stated that these parent companies had been placed under the authority of court-appointed administrators. It asked that the *pro forma* involuntary transfer be approved in conjunction with the assignment of CSI's certificates to RAC. On September 10, 1991, RAC filed a letter supplying additional information regarding its ownership and control.

2. CSI states that it is a California corporation. It is authorized to provide resold international message telecommunications services (IMTS) between the U.S., Hawaii, Puerto Rico, and the Virgin Islands, on the one hand, and Canada and various overseas points, on the other hand, by reselling the switched voice services of AT&T, MCI, US Sprint and Satellite Business Systems.[1] CSI operates under the regulatory requirements established for dominant international carriers in *International Competitive Carrier Policies* [2] since its transfer to OmniCorp International BV.[3] CSI has a tariff for international switched voice service on file with the Commission.

3. RAC is a Georgia corporation wholly owned by Resurgens Communications Group, Inc. (RCG). RCG is a publicly owned telecommunications holding company whose stock is traded on the American Stock Exchange. RAC states that RCG is not foreign owned, and that its officers, directors, and principal stockholders are citizens of the United States. Therefore, it requests streamlined regulatory treatment as a non-dominant international carrier.

4. The application states that upon consummation of the merger, each shareholder of CSI's stock will receive a compensatory amount of RCG's common stock and the stock of CSI will be cancelled. CSI will be merged into RAC, and RAC will change its name to Com Systems, Inc. (new CSI). Thus, stock of the new CSI will be 100 percent owned by RCG. The parties state that there will be no discontinuance of service as a result of this transaction, and the new CSI will continue to provide service to the public in the same manner as is now provided by CSI.

5. The applicants state as a result of the proposed transaction, the public in areas presently served will continue to receive the same service with only a change in the controlling interest of the service provider. Accordingly, the parties state that the proposed transaction is in the public interest.

6. In view of the foregoing, we conclude that the *pro forma* involuntary transfer of control of CSI to the bankruptcy administrators, and the subsequent assignment of the certificates of CSI to RAC will serve the public interest. It will permit the continuance of service to CSI customers. We note that after the proposed transfer of control, RAC (new CSI) will be subject to streamlined regulatory requirements for non-dominant international telecommunications carriers.

7. Accordingly, IT IS ORDERED that the application of Com Systems, Inc., File No. I-T-C-91-225-TC, IS GRANTED and we find that the *pro forma* involuntary transfer of control of CSI to the bankruptcy administrators will serve the public convenience and necessity.

8. IT IS FURTHER ORDERED that the application of Com Systems, Inc. and Resurgens Acquisition Corporation, File No. I-T-C-91-160-TC, IS GRANTED and we consent to the assignment of the Section 214 authorizations originally granted in File Nos. I-T-C-87-042 and I-T-C-87-069 and transferred in File No. I-T-C-89-171-TC (*see* n.1 and 3) from CSI to RAC.

9. IT IS FURTHER ORDERED that RAC (new CSI) must continue to maintain tariffs pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

10. IT IS FURTHER ORDERED that RAC (new CSI) must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61 (October 1, 1990).

11. IT IS FURTHER ORDERED that RAC (new CSI) is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in AT&T Tariffs FCC Nos. 1 and 2, MCI Tariff FCC No. 1, US Sprint Tariffs FCC Nos. 1 and 2, and Satellite Business Systems

Tariff FCC No. 4 between the U.S. and those points listed in the aforementioned tariffs in accordance with the above-captioned (*see* n.1).

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Com Systems Inc., File No. I-T-C-87-042, 2 FCC Rcd 582 (1987); Com Systems, Inc., File No. I-T-C-87-069, 2 FCC Rcd 1782 (1987).

[2] *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies)*.

[3] *See* Com Systems, Inc., File No. I-T-C-89-171-TC, 5 FCC Rcd 696 (1990). On June 11, 1990, CSI petitioned the Commission for a declaratory ruling that it is not a dominant carrier. The currently proposed transfer of CSI to RAC renders that petition moot, and we therefore dismiss it without prejudice. *See* File No. I-S-P-90-005.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-136

In the Matter of

DAVID R. PRICE

Licensee, Radio Station WOKJ(AM)
Jackson, Mississippi

Order to Show Cause Why the License of Station WOKJ(AM), Jackson, Mississippi, Should Not Be Revoked

And

Notice of Forfeiture

Appearances

Respondent, *David R. Price, Pro Se* [1]; *Larry Miller, Esquire*, and *James W. Shook, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: September 30, 1991; Released: October 7, 1991

PRELIMINARY STATEMENT

1. By *Order to Show Cause and Notice of Forfeiture* (*Show Cause Order*), released May 14, 1991, the Commission directed David R. Price to show cause why the license for Radio Station WOKJ(AM), Jackson, Mississippi should not be revoked and specified the following issues:

(a) To determine whether David R. Price violated Sections 303(q) of the Communications Act of 1934, as amended, and Sections 73.1213, 17.21(a), 17.48, 17.51 and 17.56(a) of the Commission's Rules.

(b) To determine whether David R. Price violated Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules.

(c) To determine whether David R. Price violated Sections 1.89 and 73.1015 of the Commission's Rules.

(d) To determine, in light of the evidence adduced under the foregoing issues, whether David R. Price possesses the requisite qualifications to be or remain licensee of the captioned radio station.

(e) To determine, in light of the evidence adduced under the foregoing issues, whether David R. Price should be assessed a monetary forfeiture not to exceed $250,000 and, if so, in what amount.

2. Thus, the Commission ordered that whether or not it is determined that the license for Station WOKJ(AM) should be revoked, it shall be determined if David R. Price willfully or repeatedly violated Section 303(q) of the Communications Act of 1934, as amended, and Sections 73.1213, 17.21(a), 17.48, 17.51, 17.56(a), 73.1740(a)(4), 73.1750, 1.89, and 73.1015 of the Commission's rules and, if so, whether a forfeiture should be imposed pursuant to Section 503(b) of the Communications Act of 1934, as amended, and in what amount, not to exceed $250,000, for the willful or repeated violations of any or all of the above cited provisions.

3. A prehearing conference was held on June 18, 1991, and the hearing was held on July 17, 1991. The record was closed on July 17, 1991.

4. Proposed findings of fact and conclusions of law were filed by the Mass Media Bureau on September 6, 1991. David R. Price submitted a letter dated September 2, 1991, in which he set forth his position on this matter. A reply letter was also submitted by Price under the date of September 12, 1991. Price was not represented by counsel, and he prepared and submitted his hand written letters, *pro se*.

FINDINGS OF FACT

5. David R. Price (Price) is the licensee of Station WOKJ(AM), Jackson, Mississippi, having acquired the station in 1988. WOKJ(AM) went off the air on July 20, 1990. When Price ceased operation on Station WOKJ(AM), he intended that the discontinuance of operations would be temporary. (Joint Ex. 1, pp. 1, 3.) However, WOKJ has been off the air continuously from July 20, 1990, to today. The station ceased operation on July 20, 1990, when the Mississippi Power and Light (MPL) disconnected service to WOKJ(AM) because of nonpayment of the station's electric bill. (Joint Ex. 1, p. 1.) Despite the discontinuation of operation for over a year, Price has not surrendered his license for WOKJ(AM) to the Commission. (Joint Ex. 1, p. 3.)

6. Station WOKJ(AM) has a six-tower antenna array. Each tower is 388 feet in height above the ground. The six-tower antenna array used by WOKJ(AM) is located approximately 2.5 miles north of the John Bell Williams Airport. (Joint Ex. 1, pp. 1, 3.)

7. Between July 20, 1990, and December 21, 1990, Price made no arrangements with MPL to provide power to light the tower lights of WOKJ(AM). Consequently, the station's six towers remained unlighted during periods of darkness. (Joint Ex. 1, p. 1.) On August 22, 1990, the Engineer in Charge of the Commission's New Orleans, Louisiana, office addressed the following letter to Price by *Certified Mail - Return Receipt Requested*:

Dear Mr. Price:

This office has received a report from the FAA Flight Service Station in Jackson, Mississippi, indicating that the tower lights for radio station WOKJ are not functioning. Further investigation has revealed that Mississippi Power and Light dis-

connected service to the station, including tower lighting circuits, on July 20, 1990, and that power has not been restored as of this date.

This is a violation of the terms of your station authorization and Section 73.1740 of the Commission's rules and regulations. Specifically, you have failed to inform the Commission within 10 days concerning the discontinuance of the station's operation, and more importantly, you have failed to maintain the tower lighting on this six tower array. This situation creates a serious hazard to air navigation and must be corrected *immediately*. [Emphasis in original.]

You are directed to submit a written response to this office within 3 days of receipt of this letter indicating what action has been taken to correct this serious safety condition. Your response will be reviewed to determine if further action should be taken by this office, which could include the imposition of monetary forfeitures. Of course, the FAA Flight Service Station in Jackson should be notified immediately upon restoration of tower lighting.

(Joint Ex. 1, Attachment 1.)

8. Price did not respond directly to the August 22, 1990, letter. Rather, on September 11, 1990, Price sent the following letter to the Federal Communications Commission's New Orleans office:

I am in contact with a buyer in California for WOKJ Radio. I haved stressed to him the importance of getting reference tower lights on and getting the station on the air. I will make every effort to have this completed within one week.

(Joint Ex. 1, Attachment 2.)

9. Under date of September 19, 1990, the Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, addressed the following letter to Price:

Dear Mr. Price:

This letter concerns an apparent cessation of operations by WOKJ(AM), Jackson, MS. The Federal Aviation Administration's Flight Service Station at Jackson, MS, has notified the Commission that WOKJ's towers have not been illuminated during periods of darkness in accordance with FAA requirements and Part 17 of the FCC's Rules. The FAA has informed this Commission that no report of a tower light outage has been reported to its offices and that the FAA was notified by the Mississippi Power and Light Company that electrical service provided to WOKJ(AM) was suspended, effective July 20, 1990.

Section 73.1740(a)(4) of the Commission's Rules requires a licensee to request authorization for any extended period it will be off the air. Section 73.1750 requires a licensee permanently discontinuing operation to so notify the Commission and to turn in its license. *See WGRI Radio, Inc.*, 2 FCC Rcd 5500 (1987). It should also be noted that licensees are required to keep their towers lit even if the station is not on the air.

The Commission has made no determination in this matter. However, so that we may be more fully informed, please respond to the following:

1. Have you given notification and received FCC authority to remain off the air as required by Section 73.1740(a)(4)? If so, please submit copies of any such correspondence showing that the authorization is currently in effect.

2. If WOKJ intends to remain permanently off the air, state whether you have submitted your license and other station instruments of authorization to the Commission for cancellation. If not, indicate with specificity your plans to return the station to full operation including the date upon which you expect to resume your regular broadcast schedule.

3. State the date on which the tower lights were first extinguished and explain in detail the steps you have taken to have the towers of WOKJ relit as required.

4. State whether you notified the FAA and/or the FCC that the tower lights were out; if so, provide the date of such notification and, if written, supply a copy.

Please number your answers to correspond with the questions and requests listed above, and answer each part of every question. You may include any additional information which you feel may be useful in helping the Commission make a determination in this matter. You are requested to respond, in accordance with Section 73.1015 of the Commission's Rules, within fifteen (15) days of the date of this letter. Commission policy requires that responses to its inquiries be signed by the licensee or by an officer or director of the licensee corporation.

(Joint Ex. 1, Attachment 3.)

10. David Price did not respond to the September 19, 1990, letter as directed.

11. On October 22, 1990, Price addressed the following letter to the Federal Communications Commission's AM Branch:

This letter isin [sic] reference to W O K J Radio Jackson Mississippi. In July, latter part, I took WOKJ off the air, and ask for permission to do at that time. I would like to ask for an extension of that time for an addtional [sic] sixty days from this date. Thank you for your consideration.

(Joint Ex. 1, Attachment 4.)

12. By letter to David Price dated November 7, 1990, *Certified Mail-Return Receipt Requested*, the Chief, Antenna Survey Branch of the Federal Communications Commission wrote Price as follows:

Dear Mr. Price:

This letter is a Notice of Violation. The continued light outages on the 6 antenna towers for radio station WOKJ(AM) constitutes repeated violation of Section 17.21(a) of the Commission's Rules. This rule requires that antenna structures be painted and lighted when they exceed 60.96 meters (200 feet) in height above the ground or they require special aeronautical study. Our investigation into the matter indicates that the violation has continued uncorrected between July 20, 1990 and the date of this letter.

The Commission requires that these towers be painted and lighted in accordance with FCC Form 715, paragraphs 1, 3, 12, and 21. Paragraph 1 requires that you paint your towers. Paragraphs 3, 12 and 21 require that you light your towers at night using the prescribed red flashing beacon at the top and red side lights mounted on levels at approximately two-thirds and one-third of the overall height.

You were advised on August 22, 1990 by our New Orleans office that these unlit towers are in violation of the terms of your station authorization. The letter stressed that the situation creates a serious hazard to air navigation and must be corrected immediately.

On September 13, 1990, our Mass Media Bureau requested specific information concerning your cessation of operation of radio station WOKJ(AM) and requested that you explain the steps that you have taken to restore lights on the towers.

On November 2, 1990, the Federal Aviation Administration completed an aeronautical study. They confirmed that the 6 antenna towers of radio station WOKJ(AM) located at coordinates N 32-20-41, W 90-24-50, without appropriate obstruction marking and lighting, *are a hazard to air navigation.*

Section 303(q) of the Communications Act of 1934 states that the Commission shall:

> Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers, constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation. The permittee or licensee shall maintain the painting and/or illumination of the tower as prescribed by the Commission pursuant to this section. In the event that the tower ceases to be licensed by the Commission for the transmission of radio energy, the owner of the tower shall maintain the prescribed painting and/or illumination of such tower until it is dismantled, and the Commission may require the owner to dismantle and remove the tower when the Administrator of the Federal Aviation Agency determines that there is reasonable possibility that it may constitute a menace to air navigation.

It is imperative that you take immediate action to restore the lights on these towers. If you do not restore the lights, we will initiate action to have these towers dismantled.

You are directed to respond to this Notice of Violation within 3 days of receipt. Forward your response to:

Federal Communications Commission
Chief, Antenna Survey Branch
Public Service Division, FOB
1919 M Street N.W. Room 724
Washington, D.C. 20554

Telephone: (202) 632-7522
FAX: (202) 653-5402

Your response should indicate the action taken to bring the 6 antenna towers into compliance with the prescribed obstruction marking and lighting requirements.

(Joint Ex. 1, Attachment 5.)

13. David R. Price did not respond to the November 7, 1990, letter as directed.

14. On November 8, 1990, the Chief, Complaints and Investigations Branch Enforcement Division, Mass Media Bureau sent the following letter to David Price by *Certified Mail-Return Receipt Requested*:

Dear Mr. Price:

By letter of inquiry dated September 13, 1990 (copy enclosed), we asked that you provide, pursuant to Section 73.1015 of the Commission's Rules, certain specific information within fifteen (15) days. As of the date of this letter, the Mass Media Bureau's office of Complaints and Investigations has not received your response. Accordingly, if you have not already done so, you are required to respond to the original letter of inquiry within ten (10) days of the date of this notice.

Failure to respond, or to answer fully the information requested, will constitute a repeated violation of Section 73.1015 of our Rules, and can subject you to serious sanctions as set forth under law. You are reminded that Commission policy requires you, as licensee, to sign the response.

(Joint Ex. 1, Attachment 6.)

15. David Price did not respond to the November 8, 1990, letter.

16. By letter addressed to David Price dated November 2, 1990, the Federal Aviation Administration (FAA) wrote as follows:

> This is in reference to your 6-antenna array located near Jackson, Mississippi, at latitude $32^{0}20'$ 41"N; longitude $90^{0}25'$ 60"W, 388 feet AGL/628 feet AMSL. This office has been advised that the tower

array has been without the required obstruction lighting since July 20, 1990. Subsequent to receiving this information, an aeronautical study has been conducted under the authority of sections 307(a) and 313(a) of the Federal Aviation Act of 1958, as amended, with the following findings:

The structures are located approximately 2.49 nautical miles north of the John Bell Williams Airport Reference Point. They exceed obstruction standards set forth in Part 77, Subpart C, of the Federal Aviation Regulations, 77.23(a)(2) by 177 feet, a height greater than 451 feet AMSL, with respect to the John Bell Williams Airport.

FAA Advisory Circular 70/7460-1G, Obstruction Marking and Lighting states in part, "To assure aeronautical conspicuity, any temporary or permanent object, or portion thereof, that exceeds an overall height of 200 feet (61m) AGL (including all appurtenances such as lights, rods, antennas, etc.), or exceeds any obstruction standard contained in FAR Part 77, Subpart C, should normally be marked and/or lighted in accordance with the herein described standards. An object that does not exceed any Subpart C standard may indicate, by its particular location, a need to be marked and/or lighted in order to promote aviation safety . . . "

Pilots expect any tower which exceeds 200 feet AGL to be obstruction marked and lighted unless shielded by another structure of equal or greater height which is obstruction marked and lighted. Since the existing towers are in proximity to the John Bell Williams Airport, the lack of obstruction lighting on this antenna array has created substantial adverse effects upon aeronautical operations, especially during conditions of reduced visibility and/or ceilings. The original determination of No Hazard to Air Navigation was conditioned upon continuous use of both obstruction marking *AND* obstruction lighting, therefore, the lack of one or both render the structures a hazard to air navigation.

For the preceding reasons, the towers, without appropriate obstruction marking and lighting, have a substantial adverse effect upon aircraft operations and upon the safe and efficient use of airspace. Therefore, pursuant to authority delegated to me, it is hereby determined that the existing towers are a hazard to air navigation.

This determination is subject to review if a petition is filed by the sponsor on or before December 2, 1990. In the event a petition for review is filed it should be submitted in triplicate to the Manager, Flight Information and Obstructions Branch, ATP-240, Federal Aviation Administration, Washington, D.C. 20591, and contain a full statement of the basis upon which it is made.

This determination becomes final on December 12, 1990 unless a petition for review is timely filed, in which case the determination will not become final pending disposition of the petition. Interested parties will be notified of the grant of any reviews.

(Joint Ex. 1, Attachment 9.)

Price did not file a petition for review of the FAA's air hazard determination.

17. Between the period July 20, 1990, and December 19, 1990, David R. Price made no arrangements with Mississippi Power and Light Company (MPL) to provide power to light the six-tower antenna array of WOKJ(AM). Only after the Federal Communications Commission intervened and contacted David R. Price and MPL during the period December 19-21, 1990, was an agreement reached whereby David R. Price agreed to make periodic payments to discharge past and current obligations to MPL, and it agreed to provide electricity to light the six towers of WOKJ(AM). (Joint Ex. 1, p. 3.)

18. By letter to David R. Price dated February 12, 1991, the Federal Communications Commission granted WOKJ(AM) temporary authority to remain silent through March 10, 1991, "due to financial difficulties and to locate buyer." The letter further stated that "Any further request for extension must be accompanied by a detailed report of specific steps taken to resume operation. It will be necessary to maintain prescribed tower lighting. If the station returns to air, the FCC must be notified immediately." (Joint Ex. 1, Attachment 7.) Thereafter, on April 9, 1991, Price wrote the Commission as follows:

> I would like to request an extension of authority to remain silent, for WOKJ AM, in Jackson, Mississippi, Reference Number: 8910-MM.
>
> I have at this time, an application, that has been accepted by the FCC, to transfer the ownership to another operator. This should be completed within the next sixty days. . . . .
>
> (Joint Ex. 1, Attachment 8.)

19. Price claims that he notified the Federal Aviation Administration (FAA) that the station was off the air and then left Jackson to work at Stations KNEK/KNEK-FM, Washington, Louisiana. (Tr. 37, 86; Joint Ex. 1, p. 2.) However, reference in a Commission letter appears to indicate that Price did not notify the FAA. (Joint Ex. 1, pp. 7-8 (Attachment 3).) Price was the licensee of KNEK and owned all of the stock of Dee Broadcasting, the permittee of KNEK-FM. (Tr. 56-57.)

20. Price initially stated that he did not receive any of the letters addressed to him and that Edward Carter, the manager of Station WKPG(AM), Port Gibson, Mississippi, licensed to Price, did not bring the letters to Price's attention. (Tr. 91.) Later, however, Price stated that he may have received some of the correspondence. (Tr. 94.) Moreover, Price acknowledged that the address appearing on the letters was the address for his station in Port Gibson; that he periodically visited the station; and that he received several telephone calls from James C. Hawkins, the Commission's Engineer in Charge from the Field Operations Bureau (FOB) in New Orleans, about WOKJ; and that he had telephone conversations with Jack McCoy of the New Orleans FOB office in which he was made aware of the contents of the letters. (Tr. 36-37, 91-93.)

21. As noted, during the period while the station was silent, Price requested authority from the Federal Communications Commission to discontinue operations on WOKJ. Moreover, when Price ceased operations on WOKJ, he intended that the discontinuance of operations

be temporary, not permanent. (Joint Ex. 1, pp. 9, 13-14 (Attachments 4, 7, and 8).) Consequently, Price did not surrender his license for WOKJ to the Commission for cancellation. (Joint Ex. 1, p. 3.)

22. Price claims that his failure to illuminate the WOKJ towers in periods of darkness was due to lack of money. Price states that four months after he had made financial arrangements for the purchase and operation of WOKJ and KENK and the construction of KNEK-FM in late 1988, his financial backers withdrew their support. Thereafter, according to Price, he spent his own money until it ran out, at which time he shut down WOKJ and left Jackson to work at KNEK/KNEK-FM. (Tr. 33-36.) Between July 1990 and December 1990, Price tried to sell WOKJ. His efforts failed, however, when a prospective buyer suffered serious injuries in an automobile accident. (Tr. 35-36.)

23. It appears that Cappaert Enterprises (Cappaert), Price's principal financial backer, made substantial financial contributions to Price. Specifically, it appears that Cappaert wrote checks totalling more than $125,000 to WOKJ and/or David Price in 1989, and that Cappaert wrote checks totalling more than $25,000 to Price between January 1 and June 15, 1990. After June 15, 1990, the next check to Price is dated December 10, 1990, shortly before Price agreed to make arrangements to pay the MPL electric bill for WOKJ. (Price Ex. 4.)

24. Price, either individually or jointly, owes more than $660,000 in respect to his broadcast operations. (Price Exs. 1-4.) The creditor to whom Price owes the most is Cappaert, Price's principal financial backer. To meet most of these obligations, Price has sold WKPG, Port Gibson, and has executed a contract of sale for KNEK/KNEK-FM. Price received $10,000 from the sale of WKPG and will receive a promissory note which provides for the payment of another $15,000 to Price in two years. (Tr. 68-69.) According to Price, if the sale of KNEK/KNEK-FM is approved by the Commission, Price's debt to Cappaert, which totals $544,399.29 as of April 30, 1991, will be extinguished. (Tr. 58, 89; Price Ex. 4.) Price also owes $94,806.54 to Holt Communications Corporation (Holt), the former licensee of WOKJ. (Tr. 44-45; Price Ex. 2.) Price is unsure whether the judgment that Holt has against him has been offset by any of the physical assets which Holt has repossessed which include the station's broadcast equipment, transmitter and six towers. (Tr. 74-77.) In addition, while a judgment against Price in the amount of $33,448.08 has been obtained by the law firm of Walker, Bordelon, Hamlin, Theriot and Hardy, there are four other individuals and one limited partnership that are jointly liable with Price. (Price Ex. 1.) Further, Price has not filed income tax returns for the years 1989 and 1990, either for himself or for WOKJ or for KNEK/KNEK-FM. (Tr. 82-84.) It is unknown what amount, if any, Price may owe in taxes. Price is familiar with the need to file tax returns because in 1984 he entered into an agreement with the IRS wherein he agreed to pay $97,000 in back taxes, penalties and interest. (Tr. 80-81, 84.)

25. Price claims that he presently has few assets. According to Price, he does not have a personal checking account, savings account, individual retirement account, or any kind of retirement account. He owns no securities, except for his interest in Dee Broadcasting, Inc., permittee of KNEK-FM, and he owns no life insurance. (Tr. 65-66, 73-74.) His only interests in property pertaining to WOKJ are subject to a security interest from Holt, a judgment creditor of Price. (Tr. 76-77.) Price's wife, however, has a checking and savings account. (Tr. 70-72.) Price has given the $10,000 he received for the sale of WKPG as well as the $300 to $400 per week draw he receives from KNEK/KNEK-FM to his wife, who deposits such sums in her checking account. (Tr. 69-70, 77, 79.) Although Price has a contract to sell his interest in KNEK/KNEK-FM, that sale has not been consummated.[2] In any event, it is unclear what the value is of Price's interest in KNEK/KNEK-FM's real estate and tangible assets, since no appraisal of the stations was submitted. However, it is noted that the stations are now billing $33,400 to 33,600 per month, the billing has been increasing, and the stations are becoming profitable. (Tr. 59, 65, 78.) Finally, although Price does not own any non-broadcast related real estate in his own name, his wife has two homes and two cars titled to her name. At one time, Price held title, or held title jointly with his wife, to both homes. Price transferred his interest in one of the homes to his wife in 1986 in order to obtain a loan to pay the Internal Revenue Service, and transferred his interest in the other in 1990, when he "saw a lot of these problems coming . . ." and he decided to transfer the property to her name to "get it safe." (Tr. 80-82.) There is no mortgage on this property, and it is appraised at $42,000. (Tr. 90.) Price also closed his checking account in 1990. (Tr. 72.) Price appeared at the hearing *pro se* because, he claimed, he could not afford a lawyer. (Tr. 42.)

ULTIMATE FINDINGS AND CONCLUSIONS

Failure to Illuminate WOKJ's Tower Lights

26. There are provisions of the Communications Act of 1934, as amended, and the Commission's rules, which require the licensee of a broadcast station to maintain the painting and illumination of radio towers. Specifically, Section 303(q) of the Communications Act of 1934, as amended, requires licensees to "maintain the painting and/or illumination of the tower as prescribed by the Commission pursuant to this section." Section 73.1213(b) of the Commission's rules provides, *inter alia*, that the licensee of an AM station, if the sole occupant of the antenna and/or antenna supporting structure, is responsible for conforming to the requirements of Part 17 of the Commission's rules pertaining to tower illumination. Section 17.21(a) requires that towers be painted and lighted when they exceed 200 feet in height above the ground. Section 17.48 prescribes that a radio station licensee whose tower requires illumination report immediately to the FAA any known extinguishment of any top steady burning light or any flashing obstruction light. The report is to set forth the condition of the lights, the circumstances which caused the failure, and the probable restoration of service. Section 17.51 requires the exhibition of red obstruction lights from sunset to sunrise and the continuous exhibition of high intensity obstruction lights. Section 17.56(a) requires replacement or repair of lights, automatic indicators, automatic control and alarm systems as soon as practicable.

27. The findings make clear, and it is undisputed, that during the period from July 20, 1990, to December 21, 1990, David Price, the licensee of Station WOKJ, did not illuminate the lights on WOKJ's six tower array, each tower being 388 feet in height. This conduct was in direct

violation of Section 303(q) of the Communications Act of 1934, as amended, and Sections 73.1213, 17.21(a), and Section 17.51 of the Commission's rules. Moreover, the failure of Price to illuminate the 388 foot towers of WOKJ during the extended period reflected in the findings constitute willful and repeated violations of the aforementioned statute and Commission rules. Clearly, Price knew he was under an obligation to maintain proper tower lighting for WOKJ. He further knew that his tower lights were not on during the period July 20, 1990, to December 21, 1990. These violations relating to tower lights were willful and repeated.

28. There is a dispute regarding whether Price violated Section 17.48 of the Commission's rules. Price maintains that he notified the FAA that his tower lights were not illuminated. (Tr. 86, 95.) Yet, it appears from the September 19, 1990, letter (Joint Ex. 1, pp. 1-2, (Attachment 3)) that the FAA learned of the tower light outage from the power company, not Price. But the reference in the letter is heresay and insufficient to prove that Price did not notify the FAA. Because the Bureau has the burden of proceeding and burden of proof, it is concluded that a violation of Section 17.48 on the part of Price has not been established. Moreover, it appears that Section 17.56(a) of the rules is not applicable to this case. That section deals with replacement or repair of lights and other equipment. But the Bureau has not shown that the equipment or lights required replacement or repairs. Rather, the reason the lights were not illuminated was because Price failed to pay the power company. The cited rule, Section 17.56(a), does not apply to this situation.

Authority to Remain Silent

29. Section 73.1740(a)(4) provides that if causes beyond the licensee's control prevent it from continuing to operate for a period of not more than 30 days, the licensee shall give notice to the Commission not later than the 10th day of discontinued operation. Further, if the licensee is unable to resume broadcast operations by the 30th day of discontinued operation, it shall request in writing that the Commission permit continued silence for such additional time as may be deemed necessary. However, even during periods of silence, the licensee must continue to adhere to the requirements in the station's license pertaining to the lighting of the antenna structures. Section 73.1750 prescribes that in cases of permanent discontinuance of operations, the Commission is to be notified and the licensee is to forward the station license to the Commission for cancellation.

30. It appears that Price notified the Commission that he was taking WOKJ off the air. However, it also appears that he did not request permission for additional time to remain silent until October 22, 1990, some 90 days after his initial notification to the Commission. (Joint Ex. 1, p. 9 (Attachment 4).) Further, and in any event, it is clear that Price did not maintain WOKJ's lights during the station's silence. Thus, Price violated Section 73.1740(a)(4) of the Commission's rules, at least insofar as he willfully and repeatedly failed to maintain WOKJ's tower lights during the station's silence from July 20, 1990, to December 21, 1990. However, Price did not intend to permanently discontinue operations on WOKJ. Thus, Price did not violate Section 73.1750 of the Commission's rules.

Responding to Commission Inquiries

31. Section 1.89(b) of the Commission's rules requires an answer to a Notice of Violation within 10 days of receipt or such other time as may be indicated. Section 73.1015 requires licensees to respond to Commission inquiries concerning "matter[s] within the jurisdiction of the Commission" and to do so without misrepresentation or "willful material omission[s]. . . ."

32. The findings demonstrate that, with one exception, Price repeatedly ignored Commission correspondence and a Notice of Violation dated November 7, 1990, and did not attempt to respond, timely or otherwise, to Commission inquiries. In this regard, it is recognized that during the five-month period from July 20, 1990, to December 19, 1990, the Commission directed its correspondence to Price at his station in Port Gibson, Mississippi, and that originally Price claimed he did not receive any of the correspondence because he was working at Stations KNEK/KNEK-FM in Washington, Louisiana. However, it is unlikely that Price's Port Gibson manager would have ignored official Commission correspondence directed to Price and would have failed to bring the Commission's important correspondence or its contents to Price's attention. *See, The Prattville Broadcasting Co.*, 5 FCC 2d 601, 602 (Rev. Bd. 1966). Price knew that the Commission had repeatedly attempted to communicate with him about WOKJ as evidenced by Price's conversations with the Commission's New Orleans engineer-in-charge. Indeed, Price conceded that he was aware of the contents of the correspondence based on his conversations with individuals from the Commission's New Orleans Field Operations Bureau. In light of the above, Price's failure to timely respond to the Commission's Notice of Violation constitutes a violation of Section 1.89 of the Commission's rules. Moreover, on the one occasion when Price did respond to the inquiries of the Commission's New Orleans office, he created the false impression that the problem with the tower lights would be solved within one week. The statement was based on Price's belief that a buyer of WOKJ would restore the lights. But it is inconceivable that a long time and experienced broadcaster, such as Price, could have reasonably believed that a buyer could be found who, within a week, would restore the tower lighting of WOKJ. The statement had no basis in fact, was simply wishful thinking on the part of Price, and constituted a misrepresentation in violation of Section 73.1015 of the rules.

33. It has been concluded that Price has willfully and repeatedly violated Section 303(g) of the Communications Act of 1934, as amended, and Sections 73.1213, 17.21(a), Sections 17.51, 73.1740(a)(4), and Sections 1.89 and 73.1015 of the Commission's rules. Most of the violations resulted from Price's conduct in failing to maintain the lights on his towers illuminated. As noted in the *Show Cause Order*, the Commission considers violations of antenna lighting rules to be extremely serious because of potential dangers to aviation. *Oro Spanish Broadcasting Company, Inc.*, 5 FCC Rcd 833 (1990); *Radio Beaumont, Inc.*, 13 FCC 2d 965 (1968). Other than attempting to secure a buyer for WOKJ, Price took no steps whatsoever to restore illumination of the lights of the towers. The six 388 foot towers of WOKJ were within 2.5 miles of the John Bell Williams Airport. Because of the proximity of the towers to the airport, Price, by failing to keep his lights on the towers illuminated as required by statute and Commission rules, created and permitted a potentially

hazardous condition to air navigation to persist for a period of five months. Such irresponsible and reckless conduct, by itself, fully warrants the revocation of Price's license for WOKJ.

34. Moreover, Price has demonstrated a cavalier attitude in failing to respond to Commission correspondence and a Notice of Violation. Despite repeated efforts on the part of the Commission and the FAA to generate action on the part of Price to remedy the hazardous condition which he willfully created, Price generally ignored the Commission and the FAA. He simply abandoned the station, went to work at KNEK and KNEK-FM in Washington, Louisiana, and permitted a hazardous condition to persist for over five months despite the repeated urgings of the Commission and the FAA that the matter be corrected. While Price received $300 per week from KNEK and KNEK-FM, which he turned over to his wife for deposit to her checking account, he failed to make any arrangements to pay the power company to illuminate the WOKJ towers. (Tr. 77-79.) The Commission simply cannot rely on Mr. Price as a licensee, and his willful and repeated serious violations of the aforementioned statute and rules mandate the revocation of his license for WOKJ.

Forfeiture

35. As noted, the *Show Cause Order* requires the Presiding Judge, in addition to determining whether revocation of Price's license for WOKJ is warranted, to determine whether a forfeiture should be imposed. Because the willful and repeated violations committed by Price in failing to light his towers represented serious misconduct endangering air travel around the John Bell Williams Airport, a forfeiture in addition to revocation of license is warranted. In *Standards for Assessing Forfeitures*, FCC 91-217, released August 1, 1991 (*Policy Statement*), the Commission established standards for determining appropriate amounts for forfeitures arising from violations of the Commission's rules (Section 503, Forfeitures). The base forfeiture amounts are computed as a percentage of the statutory maximum for the service involved, and are then adjusted upward and/or downward in accordance with Section 503(b)(2)(D) of the Communications Act of 1934, as amended. *See also*, Section 1.80(b)(3) of the Commission's rules.

36. The *Policy Statement* lists the base amount of the forfeiture for failure to comply with prescribed lighting and marking of towers as 80 percent of the statutory maximum. The statutory maximum forfeiture for a broadcaster is $25,000 per violation or per day of a continuing violation. In addition, for continuing violations involving a single act or failure to act, there is an overall limit of $250,000 for broadcasters. 47 U.S.C. 503(b)(2); Section 1.80 of the Commission's rules.

37. The Bureau views Price's unlighted towers as continuing violations, for which a maximum forfeiture of $200,000 could be imposed, *i.e.*, 80 percent of $250,000. Indeed, the Bureau, using the upward and downward revisions provided for in the Commission's *Policy Statement*, Appendix Section 11, concludes that a forfeiture in the amount of $125,000 should be imposed. However, pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's rules, the "ability to pay" must be taken into consideration. Also, any history of prior offenses are to be taken into consideration. Considering all the relevant factors, the Presiding Judge will impose a forfeiture in the amount of $20,000, 80 percent of the maximum amount of $25,000, for Price's willful and/or repeated violations of Sections 303(q) of the Communications Act of 1934, as amended, and Sections 73.1213, 17.21(a), 17.51, 73.1740(a)(4), 1.89, and 73.1015 of the Commission's rules. While the violations committed by Price are serious and warrant severe condemnation, the amount of forfeiture recommended by the Bureau would represent an overkill. Price's license for WOKJ will be revoked and this loss, in addition to the losses sustained by Price already, have been considered in determining the amount of forfeiture. The imposition of a $20,000 forfeiture will manifest the serious nature of these violations and will serve notice that such conduct will not be tolerated.

38. In the letters submitted by Price in lieu of Findings of Fact and Conclusions of Law and Reply Findings, he relies, in part, on facts that are not part of the record. Nevertheless, Price's basic argument is that his financial backers withdrew financial support and this caused him to take WOKJ off the air. He attributes his failure to keep WOKJ's towers lighted to a lack of money to pay the power company. He requests that he be permitted to dispose of WOKJ by a distress sale and that he not be fined more than $5,000, lest he go bankrupt. Price further argues that he has been in broadcasting since 1962 and in ownership since 1964; that he has never before had any problems with the Commission; that he has lost $300,000; that he has a minority buyer for WOKJ and was not told that he had to conclude a distress sale before the hearing.

39. Mr. Price's arguments cannot alter the conclusions or results previously reached. It is a fundamental obligation of a licensee to maintain proper tower lighting, and if Price did not have the money to keep the towers lighted, as he claims, he should have dismantled them. [3] Moreover, the time to conclude a distress sale has long past and such sale is no longer an option. *Statement of Policy on Minority Ownership of Broadcasting Facility*, 68 FCC 2d 979, 983 (1978).[4] Finally, the Presiding Judge has taken into account Price's broadcast history, his lack of prior violations, and his ability to pay in determining the amount of forfeiture.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the rules, the license of David R. Price for radio station WOKJ(AM) in Jackson, Mississippi, IS REVOKED;

IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, this Initial Decision shall constitute an Order of Forfeiture in the amount of $20,000.[5] Such payment SHALL BE SENT to the following address:

Federal Communications Commission

Post Office Box 73482

Chicago, Illinois 60673-7482

This payment should identify the payor and reference the control number of the Notice of Apparent Liability (NAL) or the Notice of Forfeiture (NOF). In this instance, the NAL control number is FCC 91-138, and the control number of the NOF is FCC 91D-51. These references SHALL BE PLACED directly on the check. A separate piece of paper is not required.[6]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Chief Administrative Law Judge

FOOTNOTES

[1] *Aaron Shainis, Esquire*, also represented the respondent.

[2] It appears from the ownership report filed for KNEK/KNEK-FM on April 29, 1991, that Price has already assigned a 49 percent interest in these stations to James H. Dulaney. (MMB Ex. 2.) Indeed, Price may already have conveyed 100 percent of the ownership of the stations to Dulaney. (*See*, Price Ex. 5.)

[3] However, while Price claims that he has no money, no assets and a large amount of debt, it appears that the vast majority of Price's claimed liabilities will be eliminated upon the assignment of the licenses of KNEK/KNEK-FM to Dulaney which has been proposed. In addition, it appears that Price has taken measures to shield his assets from creditors, particularly by placing all his former assets in his wife's name. Moreover, Price has already sold station WKPG for a net amount of $25,000 and has an agreement to sell stations KNEK/KNEK-FM for the assumption of his outstanding debt. Furthermore, Price has failed to file tax returns with the Internal Revenue Service for himself or his companies for the years 1989 and 1990. This followed the imposition of a substantial monetary penalty in 1986 for failing to comply with federal tax laws. Clearly, Mr. Price has demonstrated that he cannot be relied upon to comply with federal law or to fulfill the obligations and responsibilities of a Commission licensee.

[4] A distress sale must take place before the start of the revocation or renewal hearing.

[5] The Secretary of the Commission SHALL SEND a copy of this Initial Decision by *Certified Mail -- Return Receipt Requested* to:

David R. Price

Post Office Box 598

Washington, Louisiana 70589

[6] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-96

In re Applications of

SUNBELT LIMITED PARTNERSHIP	File No. BPH-880308ME
TROY BROADCASTING CORPORATION	File No. BPH-880310MJ
RALPH W. BLACK, JR.	File No. BPH-880310MT

For Construction Permit for a
New FM Station on Channel 234A
in Brundidge, Alabama

Appearances

John A. Borsari on behalf of Sunbelt Limited Partnership; *M. Scott Johnson* and *Peter D. Shields* on behalf of Troy Broadcasting Corporation; *Stephen T. Yelverton* on behalf of Ralph W. Black, Jr. and *Gary P. Schonman* on behalf of Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: October 1, 1991; Released: October 8, 1991

1. The three applicants in the caption and six others, now dismissed, were designated for a comparative hearing on February 22, 1990. *Hearing Designation Order*, 5 FCC Rcd 1696 (1990). The following issues remain to be resolved in this decision:

1. To determine whether Ralph W. Black, Jr. had reasonable assurance when he certified that his designated antenna site was available.

2. To determine whether Ralph W. Black, Jr. withheld from the Commission the plans he had made for his antenna site.

3. To determine whether Ralph W. Black, Jr. is financially qualified.

4. To determine whether Ralph W. Black falsely certified his financial qualifications.

5. To determine whether Ralph W. Black submitted a false document to the Commission to establish that he was financially qualified.

6. To determine, in light of the evidence adduced on issues 1-5, whether Ralph W. Black, Jr. is qualified to become a licensee.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. A prehearing conference was held on May 30, 1990. Tr. 1-13. Evidence was received and witnesses examined on September 24, 1990 (Tr. 13-239/274), September 25, 1990 (Tr. 275-526/574), September 26, 1990 (Tr. 574-707), and July 17, 1991 (Tr. 708-834). The record was closed on September 26, 1990 (Tr. 707) and reopened on June 12, 1991. *Memorandum Opinion and Order*, FCC 91M-1880, released June 13, 1991. The record was again closed on July 17, 1991. Proposed findings and conclusions were filed by the parties and the Bureau on November 28, 1990 and replies were filed by the applicants on December 19, 1990. Supplemental proposed findings and conclusions were filed by the parties on August 30, 1991 and replies were filed on September 13, 1991.

FINDINGS OF FACT

Issues 1 and 2: Whether Black had reasonable assurance for his antenna site and whether he withheld his actual plans for his antenna site.

3. In late February or March 1988, Mr. Black arranged with C. F. Roling to purchase Mr. Roling's land for his antenna site. Tr. 452. The tract Black agreed to buy is 1.71 acres and is not large enough for the tower and guy wires. Roling sold 12.19 adjacent acres to William Weeks on February 12, 1988. Black Exh. 2, at 1, 6-8. In order to support the tower, Black will need to use some of Mr. Weeks' land. On his application form, Black stated that he had received assurance in writing from Mr. Roling that he could purchase his 1.71 acres. Black Exh. 2, at 2. When he certified, he did not mention that he intended to use Mr. Weeks' land. However, on March 9, 1988, Weeks wrote Black a letter in which he agreed to give him an easement for his guy wires. Black Exh. 2, at 2. Mr. Black represents that he did not report to the Commission the assurance he received from Weeks because there was only room for one name on Form 301. *Id.*, at 2-3. He believes now that he misunderstood the instructions to the form. *Id.*, at 3. Mr. Black also did not reveal his agreement with Weeks in response to the motion to enlarge because he "did not believe that Sunbelt had raised any serious or substantial question." *Id.*, at 4.

Issues 3 and 4: Whether Black falsely certified that he was financially qualified and whether Black is financially qualified.

4. Black is an individual applicant. Black Exh. 1, at 1. Black filed his application on March 10, 1988. He certified that he was financially qualified. He relies on a loan from Harry F. Baker, a Troy, Alabama business owner. Black Exh. 3, at 1. Mr. Baker wrote, on March 7, 1988, to Black and promised to lend him $110,000 for his broadcast proposal. Black Exh. 3, at 5. Mr. Baker states in his letter that he will require as collateral that Black pledge his stock in a "corporation to be formed for the purpose of owning and operating" the Brundidge facility. *Id.* Mr. Black told Mr. Baker orally that he accepted the terms and conditions of the loan. Black Exh. 3, at 1.

5. Mr. Black represents that he approached Mr. Baker in late 1987 or early 1988. Black Exh. 3, at 1. He said he knew Mr. Baker could lend him the money because

Baker had "substantial financial means." *Id.* Mr. Baker told Mr. Black that he had net liquid assets in excess of the amount to be lent and that he had an existing bank line of credit. *Id.* Mr. Black represents that he also obtained back-up financing in February or early March 1988 from Sherrill Crowe, another Troy. Alabama business person. *Id.*, at 2. Mr. Crowe, Mr. Black represents, owns "several" fast food restaurants and is "a person of substantial financial means." *Id.*, at 2. Mr. Crowe agreed orally to lend Mr. Black the needed funds if Baker could not. *Id.*, at 2. Mr Crowe said, according to Mr. Black, that he would offer him the same loan under the same conditions as Mr. Baker. *Id.*, at 3. Mr. Black said he "assured" Crowe and Baker that the station could be financially successful. *Id.*, at 1, 3.

6. Black never told Mr. Baker any details about what the project would cost but he did tell him the overall figure he estimated. Tr. 437, 619. Black conceded that he had never seen a balance sheet or financial statements for Baker. Tr. 432, 619. Mr. Baker testified he never gave Mr. Black any other document except the March 7, 1988 letter. Tr. 626. Baker stated that he did not verify his net liquid assets with an accountant or a banker. Tr. 621. Black did testify that when he met with Mr. Baker in March 1988, Mr. Baker showed him a Merrill Lynch statement. Tr. 432. Black represented that Baker pulled the statement from a drawer and told him what was on the statement. *Id.* But Black did not examine it enough to determine what was in the account. Tr. 435. Black also testified that Baker made a telephone call to his bank to verify his line of credit during their March 1988 meeting. Tr. 441.

7. Baker, on the other hand, testified that he did not pull anything from a drawer and he did not show Black a document. Tr. 619. He also said that he did not telephone the bank during any of their meetings or discussions. Tr. 621. Baker explained that he simply told Black that he could handle it; he represented during the hearing that his word was good. Tr. 621. However, Baker said that that did not mean that he could not change his mind about lending Black money. Tr. 632.

8. Black produced a typed document at his deposition which is an estimate of his construction costs and first quarter operating costs. The typewritten assessment was prepared from handwritten notes a few days before his deposition. Tr. 443. The handwritten notes were not produced until after the deposition had begun. Tr. 443-449.

9. Black maintains that he had his estimated construction and operation costs on pieces of paper but they were destroyed shortly before the hearing, in the summer of 1990. Tr. 445. That is, except for a piece of paper he rescued from the trash on the day of his deposition. Tr. 445. That document was a two month old draft of his costs which he decided to throw out on the day of his deposition in August 1990. Tr. 448. Black said that he "found" the paper in the garbage when his counsel told him he had to show all documentation of his financial plan to the other parties. Tr. 446. He maintained that he was totally ignorant of his need to produce his estimates in response to a document request made on June 19, 1990. Tr. 446. He said that he had read the request for documents. Tr. 448.

10. On the second day of the three day hearing, Black introduced a handwritten statement from Harry Baker addressed to whom it may concern in which Mr. Baker states that he owns his home, two cars and a truck without debt. Black Exh. 4. He represents in the statement that he owes no bills older than 30 days and that he will be able to pay $120,000 to Black with his line of credit, stocks, bonds, and CDs. *Id.* Mr. Baker's statement does not assign values to the items listed. The document is dated March 7, 1988. *Id.* Black did not produce the document in response to the June 19, 1990 motion for production or identify it in interrogatories answered on July 3, 1990 or further answers to interrogatories on August 20, 1990. Tr. 521-25. He also did not mention the document during his deposition August 1-3, 1990. Black claims he saw the document in March 1988 and had found it in a drawer the week before the hearing. Tr. 519. It was not provided to the other parties until it was introduced at the hearing. Tr. 521. Baker claimed he had not remembered his March 7 financial statement at his deposition. Tr. 636.

11. Black estimates that he will need $93,250. Black Exh. 3, at 6. He has not allocated any money for legal expenses because, he represents, that those expenses will be deferred until four months after the station commences program test authority. Tr. 449, 481-85. Although he maintains that the cost estimates were arrived at before he filed his application, the agreement to defer fees with his counsel was not made until after the Hearing Designation Order was issued in 1990. The record reflects that, before the agreement was made to defer fees, monthly statements were submitted to Black for payment (Sunbelt Exh. 10) and even after the deferral agreement, statements were submitted for payment of expenses. Sunbelt Exh. 8.

12. Black intends to purchase land from Roling for his antenna site. Black claims that he discussed the price of the land with Roling in March 1988. There are two copies of the same letter, one with and one without the sale price. Black Exh. 2, at 9; Sunbelt Exh. 9.

13. Black said that he received the letter without the price of the land and he then asked Mr. Roling to add the price to the original letter. Tr. 495-511. Mr. Roling said he typed the first letter on March 8, 1988 and typed the amount in sometime later. Tr. 652-53. Mr. Roling said there were two versions of the letter because his copy machine was broken and he typed the letter twice. Tr. 664-65. He added the price in order to give Black "something" in writing. Tr. 655.

14. Black has paid legal, engineering and FCC fees out of personal funds; these expenses total $15,000. Black Exh. 3, at 2; Tr. 484-85, 488-89, 491, 632-33. Baker currently has net liquid assets of $300,000. Black Exh. 3, at 13-16. Baker has stated he still intends to lend Black the money to build and operate the station. Black Exh. 3, at 11. In 1981, Black was sentenced to jail for fraudulently and repeatedly passing "bad checks." Tr. 467. Black claimed he spent one day in jail but court records show he spent four days. Tr. 466, 468. Baker said he was aware of Black's past legal and financial problems. Tr. 630-32.

Issue 5: Whether Black submitted a false document to the Commission to establish that he was financially qualified.

15. Black is relying on a loan from Harry F. Baker. Mr. Baker signed a letter dated March 7, 1988 promising to lend Black $110,000. Black Exh. 3, at 5, 12. The letter states that Baker has net liquid assets "well in excess of the amount to be loaned" and an existing bank line of credit. *Id.* Baker did not make any reference in his written testimony to the subject of this issue, a handwritten

accounting dated March 7, 1988. Black Exh. 3, at 10-11. Baker testified twice at the hearing and his deposition that the only document that resulted from his discussions with Black in March 1988 was the letter dated March 7, 1988. He represented that he did not give Black a balance sheet, financial statement or any similar document. Tr. 619-21, 626. On redirect examination, when he was shown the accounting, dated March 7, 1988, which is in his handwriting, he claimed that he had prepared the document at the time. Tr. 635-36. Baker was asked by Black's counsel why he had not mentioned his accounting previously. Tr. 636. Baker represented that he had referred to the note on cross-examination when questioned. Tr. 636. But Baker's written testimony on the financial issue does not reflect any mention of his accounting. Tr. 626.

16. Black did not mention Baker's accounting in his written testimony either. Black Exh. 1, at 1; Tr. 611. Black represented on cross-examination that Baker did not show him a balance sheet or financial statement or statement of net liquid assets; he claims that Baker did pull from his desk drawer a Merrill Lynch statement and told him what was on the statement. Tr. 432, 479-80. Black stated that it was on the basis of Baker's description of his holdings in his Merrill Lynch account and the line of credit at the bank that he concluded Baker had the money to give him. Tr. 435, 480. Black did not refer to the March 7, 1988 accounting and he stated specifically that the only written material evidencing their discussions was the letter attached to Black Exh. 3, which is dated March 7, 1988. Tr. 452. Then on redirect examination, when his counsel showed him the accounting dated March 7, 1988, he represented he had seen it in March 1988 and it had been "obviously lost" until he received Sunbelt's Motion to Enlarge against him alleging that he was not financially qualified. He claimed he then "turned the desk upside down" and found Baker's accounting. Tr. 519. Black said he did not mention the Baker accounting on cross-examination, although it is apparent that he knew it existed, because the subject matter "was financial statements, stocks, bonds, certificates of deposit," etc. Tr. 519. Black said he found the Baker accounting in his desk sometime between Wednesday, September 19 and Friday, September 21, 1990. Tr. 594. He concedes that he never mentioned it during discovery, in answers to interrogatories or at his deposition. Tr. 580-87.

17. The Baker accounting is on paper with Harry Baker's letterhead. Troy Exh. 17, at Appendix A. The letterhead gives his address, name and indicates he is a jeweler. *Id.* The accounting is in Baker's handwriting and indicates he will be able to establish $120,000 with his line of credit, stocks, bonds, and C.D.s. *Id.*

18. Richard L. Brunelle, a forensic chemist, testified that the Baker accounting was not written on March 7, 1988. Troy Exh. 17, at 1, Appendix B; Tr. 723, 745, 747-49, 755. Brunelle, through examination of Baker's accounting, concluded that the ink was "drying rapidly" which meant that the document was written within the six months to one year of November 23, 1990, the date on which he conducted his tests. *Id.*

19. Brunelle has established that ink written on documents dries rapidly during the first six months to one year and after one year it slows down to a point where, after two years, the drying rate is usually imperceptible. Mr. Brunelle developed this test, which is referred to as the Accelerated Aging Test, with Dr. A. A. Cantu, a physical chemist with the U.S. Secret Service. In 1988, Dr. Cantu reported on the feasibility of conducting an aging test by heating an ink sample. Black Exh. 6, at 5; Tr. 727, 729-30, 757-58. Brunelle's technique compares the dye components with the aging curves of the same ink formulation. Troy Exh. 17, at 1-3; Tr. 724-25, 741-42, 779. Previously, forensic scientists would compare the questioned ink with another ink sample of known age on similar paper, stored under similar conditions, but the accelerating aging test permits such a determination by comparison to an aging curve previously established for the same ink as that used on the questioned document. Tr. 749-51.

20. Mr. Brunelle is an expert witness. He has a B.A. degree in chemistry and a masters degree in forensic science. From 1961 to 1988, he worked for the United States Government as an analytical and forensic chemist. At the time he left the government, he was Chief, Forensic Science Lab at the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department. Troy Exh. 17, Appendix C, at 2. Brunelle, among other awards for research developments, received an award from the International Association for Identification for developing a technique of ink identification and drying. *Id.* He has also served as a representative of the Department of Treasury at Interpol Forensic Science meetings in Paris in 1975, 1978, 1983, and 1986. *Id.* He is a member of the Editorial Board of the Journal of Forensic Science. *Id.* He has written books and numerous articles in his field, some of which have dealt with the relative age of ballpoint inks. *Id.* Since September 2, 1988, Brunelle has given testimony in twenty ink dating cases, in 13 of these he used the test applied here. Troy Exh. 17, at 2-3, Appendix D, Tr. 779-80. In seven of the cases, Brunelle also performed the Comparative Aging Test; the results from both tests were the same. Troy Exh. 17, at 2-3.

Issue 7: Comparison of the applicants to determine which proposal would best serve the public interest.

Sunbelt

21. Sunbelt is a limited partnership with three partners, Osbern Henley, R. E. Shelley, and John B. Crawley. Sunbelt Exh. 1, at 1. Each partner has an equal share of the equity but Henley is a general partner and Shelley and Crawley are limited partners. *Id.*

22. When Sunbelt filed its application, it was a corporation called Sunbelt Developers, Inc. Sunbelt Exh. 1, at 2. The company was owned by the three partners with each partner owning 33%. Sunbelt Exh. 5, at 3. Mr. Henley was not an officer or a director, only Shelley and Crawley were. Sunbelt Exh. 5, at 3; Sunbelt Exh. 6, at 2. Mr. Henley stated that it was communications counsel's suggestion that Sunbelt's owners change to a partnership. Tr. 62. According to Mr. Henley, it was counsel's assessment that the corporate arrangement could present a problem. Tr. 67.[1]

23. Mr. Henley initiated Sunbelt's proposal. He contacted Mr. Shelley who in turn recommended Mr. Crawley. Tr. 119-123. Mr. Shelley and Mr. Crawley already had established a corporation in 1980 to invest in real estate. Sunbelt Exh. 5, at 3. Mr. Shelley explained that the corporation had little business activity and, therefore, was an appropriate legal entity for owning the radio station. *Id.* Mr. Henley selected Sunbelt's antenna site. Tr. 193-95. Mr. Henley, with the help of a consultant, prepared the application. Mr. Shelley reviewed and signed

the application. Sunbelt Exh. 5, at 2. The Sunbelt partners maintain that they intended to have Mr. Henley operate the station and the other two partners act only as investors. Sunbelt Exh. 1, at 2; Sunbelt Exh. 5, at 2; Sunbelt Exh. 6. Mr. Crawley, who provided legal help to the applicant, said that he would not have used the corporation if he had known that the Commission would recognize only a nonvoting status for the investors or a limited partnership. Sunbelt Exh. 6, at 1.

24. When communications counsel suggested a limited partnership, the agreement was written to exclude limited partners from employment or involvement in the business of the partnership. Sunbelt Exh. 1, at 6. However, after the limited partnership was formed, the limited partners arranged for an extension of the site option which they had originally obtained from a friend. Sunbelt Exh. 5 and 6; Tr. 208-11. Mr. Crawley, along with communications counsel, wrote the partnership agreement. Tr. 68. Mr. Henley never discussed the agreement in detail with anyone; he left it to Crawley and communications counsel. Tr. 70. Mr. Crawley filed the agreement with the local governments. Tr. 72. When communications counsel was hired, Mr. Shelley signed the retainer agreement. Tr. 73. After the application was filed, Mr. Crawley investigated a competing applicant. Tr. 89-90, 172. He sent his findings to communications counsel. Tr. 90; Troy Exh. 11. Money to pay bills has come from Crawley, Shelley and a Sunbelt Developers' account. Tr. 98. All Sunbelt checks, produced during the proceeding, were signed at the outset by Jo Ann Messick, the treasurer of Sunbelt Developers, and later by Mr. Shelley. Troy Exh. 12. Sunbelt does not have a bank account. Tr. 97-98.

Integration of ownership into management

25. Osbern Henley promises to work full time, 40 hours per week, as the station's general manager. Sunbelt Exh. 1, at 1. He will oversee all aspects of station operation. Sunbelt Exh. 4, at 2-3. Except for 1967, Mr. Henley has lived in Troy, Alabama since 1985. Troy is within the 1 mV/m contour. Sunbelt Exh. 4, at 4. Mr. Henley has been an officer (1977-85) and trustee (1985-88) of Salem-Troy Baptist Association which serves churches in Brundidge. Sunbelt Exh. 4, at 5. Since 1982, he has worked at broadcast stations; he has been a general manager since 1983. Sunbelt Exh. 4, at 4-5. While Mr. Henley states he has been general manager of WGEA(AM) and WRJM-FM since 1987, he only spends three days a week there. Tr. 56.

Mass Media Interests

26. Sunbelt and its limited partners do not have mass media interests. Sunbelt Exh. 3. On March 15, 1991, Mr. Henley became manager and chief engineer of WDAU-TV, Ozark, Alabama. Amendment filed April 30, 1991. At that time, he gave up his position as general manager of WRJM-FM and WGEA(AM). *Id.* In his testimony Mr. Henley stated he would end all other employment if a grant was made. Sunbelt Exh. 4, at 2. Mr. Henley also stated in Sunbelt's April 30, 1991 amendment that he will end his association with WDAU-TV. Amendment filed April 30, 1991. However, Sunbelt did not notify the Commission about Mr. Henley's intention to end his employment at WDAU-TV until 45 days after he took the new position. *Memorandum Opinion and Order*, FCC 91M-1880, released June 13, 1991.

Auxiliary power

27. Sunbelt will install auxiliary power at its transmitter and studio. Sunbelt Exh. 2.

Troy

28. Troy is a corporation. Asa Dudley is secretary, James Roling is vice president, and Joe Gilchrist is president. Troy Exh. 1. They each are directors and own 33 1/3 percent of the stock. *Id.*

Integration of ownership into management

29. Asa Dudley proposes to work full time, 40 hours per week as the general manager. Troy Exh. 2, at 2. He will be responsible for operation of the station, oversee administrative and financial matters, hire and fire all personnel, and oversee the programming and sales department. *Id.*

30. James Roling proposes to work full time, 40 hours per week, as the station's sales manager. Troy Exh. 3, at 1. His duties, he said, will be the same as those he currently has at Troy's AM station, WTBF. He currently attends staff meetings but he spends most of his time selling ads; he also works an on-air shift. Tr. 331-333. He spends 40-50 hours per week selling time. Tr. 339. He supervises one other salesperson (Tr. 289). He also assigns accounts (Tr. 289) and resolves disputes over accounts. Tr. 291. He meets with the other sales person several times a week and directs the sales. Tr. 328-29. Mr. Dudley runs the weekly sales and staff meetings but Mr. Roling is in charge of the sales discussions at the meetings. Tr. 337. Mr. Roling also handles the regional advertising representatives. Tr. 334.

31. Joe Gilchrist proposes to work full time, 40 hours per week, as chief engineer and operations manager. Troy Exh. 4, at 4. He will oversee all technical personnel and equipment maintenance. *Id.* He currently spends 10-15 hours per week on engineering duties. Tr. 367-73. He fixes equipment and supervises building maintenance. Tr. 286-88. In his role as chief engineer, he supervises a part-time service worker, contract engineer, and the engineering operations of announcers. Tr. 358, 286, 311. As operations manager, he will oversee the payroll, general ledger and monthly statements, including billing and collection. Troy Exh. 4, at 1-2. His duties will be the same as at the AM. Tr. 351-53. Currently, he spends 3-4 hours per day as the station's computer operator. Tr. 295, 352-53. He enters programming information provided by the program director and keeps the books. He prepares checks and, although he has the authority to sign them, Mr. Dudley always signs the checks. Tr. 295, 305.

32. The three owners "review" prospective employees and terminations, but Mr. Dudley implements the decision. Tr. 306. They also develop policies together. Tr. 306, 372-73.

33. Mr. Dudley lives in Brantley, Alabama which is outside the proposed 1 mV/m contour. Troy Exh. 2, at 1. He now works at Troy's AM station which is within the 1 mV/m contour. *Id.*, at 1-2. He lived in Troy from 1947 to 1963. *Id.*, at 1. Mr. Dudley has belonged to the Troy American Legion Post since 1979; the Pike County Blood Program Committee since 1979; and since 1982 he has belonged to the Troy Exchange Club. *Id*, at 3. In 1985 he was president of the Exchange Club. *Id.* He also belongs to the Pike County Chamber of Commerce, United Appeal, and Emergency Preparedness Agency. *Id.*, at 3. He

has served on information and publicity committees for those organizations. *Id.*, at 3. Mr. Dudley has worked at WTBF since 1949. *Id.*, at 3-4. He has been there full time since 1951. *Id.* Beginning in 1977, he became the general manager. *Id.*

34. Mr. Roling has lived in Troy since 1943 except for the years 1968 to 1979. Troy Exh. 3, at 1. He has been a member of the Troy planning and zoning committee since 1983, the county medical foundation since 1986, the Troy Rotary Club since 1979, the American Legion since 1986, and from 1979 to 1983, he was a Girl Scout leader. *Id.*, at 2. He regularly attends Rotary meetings but not those of the American Legion. Tr. 324. He also has belonged or belongs to various Pike County business committees and organizations and a Troy church. *Id.* Mr. Roling appears to have been employed in broadcasting since 1968. *Id.*, at 3-4. He was a student announcer from 1962 to 1968. *Id.*, at 3.

35. Mr. Gilchrist has lived in Troy since 1930. Troy Exh. 4, at 1. He is a longtime member of a Troy church, the Troy American Legion, and an alternate member of Pike County Emergency Preparedness Agency. *Id.*, at 2. He has worked at WTBF since 1946. *Id.*, at 2-3.

Mass media interests

36. Troy is the licensee of WTBF(AM) in Troy, Alabama. Troy and its owners will divest their interest in WTBF before beginning operation pursuant to test authority. Troy Exh. 5.

Auxiliary power

37. Troy proposes auxiliary power at both its transmitter and studio. Troy Exh. 6.

Black

38. Ralph W. Black, Jr. is an individual applicant who intends to reorganize as a corporation if he receives a grant. Black Exh. 1., at 1. Black represents that he will be the only stockholder and will have 100% of the voting control of the corporation. *Id.* Harry F. Baker, who has promised to lend Black money for the station, testified at his deposition that he would receive stock. Tr. 616-17. Mr. Black admitted that he and Baker had mentioned the possibility of Baker having stock but he said they had not had discussions. Tr. 593.

Integration of ownership into management

39. Black proposes to work full time, 40 hours per week, as the general manager. Black Exh. 1, at 1. He will direct the overall operation of the station and set policy. *Id.* Mr. Black has lived in Troy, Alabama since 1971; Troy is within the proposed station's city grade signal. *Id.*, at 2. Mr. Black has participated in activities in Troy since 1971. These have included the PTA from 1971 to 1982, coaching and organizing various baseball leagues from 1976 to 1978, belonging to the Exchange Club from 1979-82, 1988 to the present, the Chamber of Commerce from 1985 to the present, the Troy Solid Waste Advisory Committee from 1988 to the present, an usher and layman at his church since 1981, organized Christmas gifts to the underprivileged in 1986, organized a Christmas program at the Troy Group Home in 1986, and belonged to the Booster Club from 1980-83 and Action Club 1985-87. Black Exh. 1, at 2-3. Mr. Black has worked at broadcast stations since 1964; during 1967-68, 1976-83, he worked full time and since 1985 part-time. Black Exh. 1, at 3.

Mass media interests

40. Black has no media interests except for his part-time job which he will leave if a grant is made. Black Exh. 1, at 4.

Auxiliary power

41. Black proposes to provide auxiliary power at the studio and tower site. Black Exh. 1, at 4.

Comparative coverage

42. The following chart provides the total area and population within each applicant's 1 mV/m contour. Jt. Eng. Exh., Figure 5.

Applicant	Population (1980 Census)	Area (Sq. km.)
Black	30,598	1,912
Troy	28,929	1,798
Sunbelt	25,044	1,615

43. During daytime hours, all of the areas that each of the applicants would serve already receive five or more aural services. Jt. Eng. Exh., at 2. During nighttime hours, all three applicants provide coverage to areas that are underserved (served by fewer than five aural services). Jt. Eng. Exh., at 4. None of the applicants proposes to serve white areas (areas that presently receive no service) or grey areas (areas that presently receive only one service).

44. The following chart demonstrates the extent to which each applicant will provide a new service to underserved areas during nighttime hours. The population figures are derived from 1980 Census data. The area figures are in sq. km.

Applicant	3rd New Service (Pop/Area)		4th New Service (Pop/Area)		5th New Service (Pop/Area)	
Troy	0	0	1,013	90	101	14
Sunbelt	24	5	2,092	108	154	46
Black	52	17	1,900	131	128	27

CONCLUSIONS

Issues 1 and 2: Black has reasonable assurance for his antenna site, although he did not file an accurate certification for the site.

45. The record reflects that Black intends to locate his tower on land now owned by C. F. Roling and tower guy wires on land owned by William Weeks, which Weeks purchased from Mr. Roling on February 12, 1988, a month before Black filed his application on March 10, 1988. Black has written assurance from both Roling and Weeks for the use of their land. Black has agreed to purchase 1.71 acres from Roling and Weeks has agreed to give Black an easement for the guy wires. When Black certified that he had reasonable assurance for his designated site, he did not identify Mr. Weeks as someone who had agreed to let him use his land for his tower. The certification mentioned only Mr. Roling.

46. Despite written assurance from both landowners, Black's response to questions raised about his proposed site did not provide full information about his plans. He claims that he did not provide Mr. Week's name in response to Form 301's site certification question because there was only room for one name. While he claims that he misunderstood the instructions, he failed to correct his mistake in his response to the petition to enlarge issues about his arrangements for the site. Mr. Black failed to explain until the hearing what his actual plans are for his tower. While there was no apparent reason for Black to withhold facts about his site arrangements, he did. Significant time was spent considering an issue which could have been easily resolved in written filings if Black had answered Form 301 accurately or corrected his error when it was brought to his attention in the petition to enlarge. Applicants are expected to act in good faith with regard to Commission inquiries and in response to pleadings. Black could easily have explained his arrangements but he chose not to do so at considerable time and expense to the proceeding. His actions call into question whether the Commission can rely on his representations. While Black has reasonable assurance for his proposed site, his certification answer was not accurate and complete. His response to the petition to enlarge under that circumstance was not forthcoming. But his actions in response to this issue are not, standing alone, disqualifying. However, when his failure to report accurately his site plan is weighed with the other qualifying issues raised about his proposal, it leads to the ultimate conclusion that Black is not qualified to become a radio broadcast licensee.

Issues 3 and 4: Black has not demonstrated that he certified his financial qualifications in good faith. He has not established that he is financially qualified.

47. From the time Black filed his application, he intended to borrow the money he needs to build and operate the station from Troy, Alabama business owner, Harry F. Baker. Baker wrote to Black three days before the application was filed, on March 7, 1988, and promised to lend him $110,000. The March 7, 1988 letter from Baker to Black states that he will lend him the money at 3 percent above "New York prime rate" to be repaid over a 10 year period. Baker's letter requires that a corporation will be formed to own the station and that Black pledge his stock to Baker as collateral for the loan. Black claims he needs about $93,250 to meet his estimated costs. This amount includes constructing a tower, transmission and studio equipment, and three months operation costs. The first issue presented is whether Black had any basis for assuming that Baker could provide him with the promised loan.

48. Black said that he knew Baker had "substantial financial means." He stated that Baker told him that he had sufficient net liquid assets to make good on his promise. Baker informed Black that he had a line of credit at a bank which could be used to meet his promise. However, Baker did not provide Black with any written support for his ability to provide the loan. Both Black and Baker agree that Black never saw a balance sheet or financial statement for Baker. And Baker concedes he did nothing to assess his net liquid assets. Black claims that Baker showed him and described to him a statement from his Merrill Lynch account and that Baker made a telephone call to his bank to verify his line of credit when they met in 1988 to discuss the loan. Baker denies that he showed and described to Black his Merrill Lynch statement or that he called his bank about his line of credit. Baker maintains that he simply told Black that he could handle the loan. Black's testimony about what Baker did to verify his ability to lend Black all the money he needed is not supported by Baker's testimony or any corroborating evidence. The record shows that Black had no objective evidence to support his assumption that Baker had the necessary net liquid assets.

49. It is also evident that Baker insisted on an ownership interest in the applicant for his loan, which Black denies he agreed to provide or would provide. Until Black produced Baker's letter, he had not revealed that he intended -- or would be required -- to organize a corporation. Before this issue was heard, Baker stated at deposition sessions that he expected Black to give him stock in the corporation. Baker denied that Black had agreed to give him part ownership of the station at the hearing (Tr. 618) but his answers at the deposition were unequivocal that such a promise had been made. Tr. 616-18. When asked about the loan, Baker said he would not lend the money directly to Black but to a corporation. Tr. 616. He said a stock split would be worked out later. *Id.* He said he had not wanted Black's personal endorsement on a note because "[t]he corporation is what I would be interested in." Tr. 611. He represented that he would be part of the corporation. *Id.* He said that he did not have much concern about repayment of his money because he intended to have an interest in the corporation that would hold the license. *Id.* Baker said it would not be a partnership because he would "insist" on a corporation. Tr. 617-18. According to Baker, the only aspect of the transaction that was left open was how much of an interest he would receive. Tr. 618. While Black denied he made that promise, there is no evident reason why Baker would have believed he was going to receive an ownership interest if he had not discussed it with Black. Black concedes he intends to organize a corporation if he is granted the license. Baker's testimony, given at his deposition, is more reliable than his hearing testimony when he was obviously trying to help Black resolve this issue in his favor.

50. Black has also failed to demonstrate that he determined how much it would cost to build and operate the station before he certified. Black's response to whether he determined his costs before certifying lacks credibility. There is no reliable evidence that Black had any list of estimated costs, or that his $93,250 estimate included all the items necessary to finance his proposal. Black produced at his deposition a typewritten list of costs which he said was prepared from handwritten notes. However, he concedes the list was prepared just before the deposition and after designation of this case for hearing. He claims he destroyed his original notes just before the hearing. Black produced only one underlying document which he said he retrieved from his trash at the time of his deposition. But that document did not exist at the time of certification, it is a sheet of paper with notations about projected costs that he claims he prepared two months before his deposition. He rescued the notes, he said, after his counsel told him he must search for supporting documents. The documents were to be produced in June but he did not produce any, although he had read the request and apparently had not destroyed his notes at

that time. Despite Black's claim that documentation of his financial estimates existed when he certified, Black did not identify any documents about his finances in response to two sets of interrogatories or a document request. It was not until he got to his deposition that he claimed he had documents that were recently destroyed.

51. When Black was questioned about specific elements of his financial proposal, it was evident that he formulated his plan long after certification. For example, when he was questioned about his failure to provide for legal fees, he claimed that he has an agreement with his counsel to defer legal fees until four months after he begins test authority. But his agreement with counsel was not made until after the HDO was issued, long after he certified. The objective evidence in the record indicates that there was no intention at the time of certification to defer fees; instead the record reveals that counsel submitted bills for payment until the agreement was made and even then it was still expected that Mr. Black would pay counsel's expenses. The letter from Mr. C. F. Roling about the sale price of the land for Black's proposed antenna site also detracts from Black's claim that he made reasonable cost estimates before he certified. Mr. Roling concedes that his original March 8, 1988 letter to Black did not have a price for the land and that he later retyped the letter at Black's request and added a price for the land. Mr. Roling admits that he dated the new letter March 8, 1988, although it was written some time later. Mr. Roling could not remember exactly when the price was added. Securing estimates of costs after certification might not be so bad but Black attempted to make it appear that he had the estimates before certification, when he did not. There is no objective evidence that he did what he claims and there is evidence that he destroyed records when he knew, or should have known, they were subject to discovery, rewrote letters to add missing elements without indicating they had been retyped and materially altered, and represented that arrangements had been made for deferring fees, when the actual arrangement was made long after certification.

52. There is no credible evidence that, when Black certified, he knew that Baker could provide the money he relied on or that he had determined how much money he would need. Black has not established that his certification was made in good faith. More importantly, Black's response to questions raised by this issue has not been truthful and reliable. Nor can it be concluded that Black is financially qualified since the lender who will provide Black money believes he will receive an ownership interest if he makes the loan and Black has stated that he will not give him one.

Issue 5: Black has not established that the document which purports to be an accounting of Baker's assets was contemporaneous with his financial certification.

53. Black maintained throughout discovery that he had not actually received any accounting from his lender, Harry F. Baker. He repeated that in his written testimony and during cross-examination. Baker gave testimony which corroborates Black's testimony that he received only a letter from Baker in March 1988 which promised that Baker would lend Black $110,000. While Black and Baker gave conflicting testimony about what knowledge Black had about Baker's affairs when he certified, they agreed that he had never seen a financial accounting for Baker. On redirect examination, Black was shown by his counsel a short handwritten note signed by Baker which purports to be a brief accounting of Baker's assets and liabilities. Black maintains that Baker wrote it on his stationery, on March 7, 1991, and gave it to him. This document remained "lost", Black claimed, until he made a search of his desk after seeing Sunbelt's motion to designate a financial issue against him. Black found the accounting on either the Wednesday, Thursday, or Friday before the hearing, which began on September 24, 1990. Although it had been only a couple of days, Black was unable to give the exact day that the document turned up.

54. Black's account of his search for and discovery of Baker's March 7, 1988 accounting appears highly improbable. The petition to enlarge which brought about the search was filed five months earlier on May 2, 1990. This issue was designated on June 1, 1990, document requests were made in June, depositions were conducted in July, written testimony was exchanged on September 12, 1990 and throughout all that time neither Black nor Baker remembered any other document, let alone an accounting of Baker's assets. The document, which Black alleges was prepared on the same day as Baker's letter, provides that Baker is prepared to lend Black $120,000, while his letter of the same date provides that Baker will lend Black $110,000. The letter of March 7, 1991 is on plain paper while the found accounting is on Baker's stationery. Once this issue was designated neither Black nor Baker appeared to explain these differences. It has already been found that Black's representations in this proceeding have not been reliable. It appears highly improbable that neither Baker nor Black would have not remembered what Black believed to be a key document in establishing that he had a basis for depending on Baker for his financial support. It is even more improbable that Baker would not have mentioned his accounting in his oral testimony -- or for that matter that Black would not have. Both were repeatedly given an opportunity to establish their financial deliberations. And when given an opportunity to explain in detail how they both forgot, they gave no testimony; they remained silent. It is unlikely that both Black and Baker would forget a document Black considered to be key to his qualifications during the five months the financial issue was being litigated.

55. Troy sponsored an expert witness who maintains that the document was written long after the time it was dated. Richard L. Brunelle, a forensic chemist, conducted an analysis of the drying rate of the ink on Baker's accounting. He concluded that the ink was "drying rapidly," which indicates that the document was written within six months to one year of the date he conducted the test, November 23, 1990. Black and Baker represented that the accounting was written on March 7, 1988. If that were the case, Brunelle stated, the drying rate of the ink on the document would have slowed down and have been almost imperceptible. Black failed to counter Brunelle's testimony.

56. Black's argument against the Brunelle Accelerated Aging Test relies on matters not in evidence and facts rejected. Because Black has failed to base his arguments on the facts of record, they will not be considered. As already pointed out with regard to the antenna site issue, Black's strategy in this hearing has been to withhold facts central to judging his qualifications. Black was unwilling to test his assertions in the hearing, he failed to present the witness he noticed, and now he argues from untested

evidence. The only legal argument that Black asserts that is relevant is that Brunelle's testimony is at the periphery of what the scientific community considers acceptable. The evidence does not show that to be the case. Brunelle's credentials are those of an expert in his field. He has long been involved in research on the aging qualities of ink. Since 1988, he has testified in court proceedings 13 times. Brunelle's testimony is, of course, not the only basis for determining that Baker and Black lied. Their own testimony is inconsistent and deceptive. Brunelle assisted in supporting that conclusion.

Issue 7: A comparison of the applicants leads to the conclusion that Troy's proposal would best serve the public interest

57. Black is not qualified and will not be compared. Troy and Sunbelt are qualified applicants and will be compared. Sunbelt is a limited partnership with three partners, each of whom holds an equal share of the partnership equity. Osbern Henley is the general partner and R. E. Shelley and John B. Crawley are limited partners. Initially, Sunbelt organized as a corporation with equal shares. But when the principals discovered that if they continued as a corporation they would be at a disadvantage comparatively, they reorganized as a partnership. To demonstrate that their reorganization was not just driven by the comparative preferences that the limited partnership provided, they claim that the limited partnership form reflected their actual intentions from the outset of their proposal. Shelley and Crawley represent that they never intended to participate in the operation of the station. Sunbelt points to the fact that Mr. Henley, even when Sunbelt was a corporation, undertook preparation of the application, albeit with the applicant's consultant. Sunbelt concedes that Mr. Crawley, who is a lawyer, did provide legal help when the partnership was formed and that he gathered evidence for a petition to enlarge afterward. In addition, since the partnership was organized, Shelley and Crawley have also renewed the option for the proposed antenna site, which they originally arranged for with a friend of theirs. From the outset, they have both provided money for pursuing the proposal and they continue to do so. But in this case, the activities of Sunbelt's limited partners in forwarding its proposal do not support a basis for projecting that Osbern Henley will not control and operate the proposed station.

58. Rudolph E. Shelley explained that he is 69 years old and that he has spent the last several years converting his businesses to passive investments. Sunbelt Exh. 5, at 2. Mr. Shelley did arrange with Randolph Johnston for the tower site; Mr. Shelley has known Mr. Johnston for 30 years. *Id.* John Crawley also represented that he did not intend to change his career if Sunbelt received a grant. Sunbelt Exh. 6, at 2. He has practiced law in Pike County for over 20 years. *Id.* In fact, Mr. Shelley did give up the practice of law after the close of the record; he became an Alabama Circuit Court Judge in Alabama's highest trial court of record. Petition for Leave to Amend, filed April 30, 1991 by Sunbelt Limited Partnership. Mr. Henley has not been passive in preparation of the proposal, has participated in locating the frequency and contacted Mr. Shelley. Tr. 119-23. They had known each other for thirty years. Sunbelt Exh. 6, at 4, Sunbelt Exh. 5, at 1. While he did not arrange for the site, he selected it. Only Mr. Henley has broadcast experience and is currently engaged in broadcasting. It would be unrealistic to conclude that Shelley and Crawley will share operation of the station with Mr. Henley. Moreover, Sunbelt's partnership agreement does provide for the exclusion of the limited partners from the business of the partnership. It contains the necessary provisions to insulate the limited partners. The general partner, Osbern Henley, has an equal share of the equity. While the limited partners have undertaken a limited number of tasks to put forward the proposal, Mr. Henley initiated the proposal, took care of preparing the application and the role of the limited partners has not been material to determining how the broadcast business will be operated.[2]

59. Mr. Henley proposes to work full time, 40 hours per week, as the general manager. He has lived in Troy, which is within the primary service contour of the proposed station, since 1985. He has participated in civic activities to a very limited degree; he has only participated in an area church organization. Mr. Henley has worked at broadcast stations for the last eight years. He has been a manager since 1983. The record reflects, however, that, since 1987, he only has spent three days per week at the station.

60. Troy is a corporation with three equal stockholders, Asa Dudley, James Roling, and Joe Gilchrist. They each own an equal share in the corporation. Dudley, Roling and Gilchrist have each promised to work full time, 40 hours per week, as managers of the station. Dudley is the proposed general manager, Roling is the proposed sales manager, and Gilchrist is the proposed chief engineer and operations manager. Troy's owners currently operate a station together and their proposed positions for the Brundidge facility are the same as those they now occupy at their Troy station. The record reflects that while they currently perform some tasks that are not managerial, it appears that that is the case because the station's staff is small. There is evidence that each supervises and manages various parts of the station and participates in setting station policy.

61. Mr Roling lives in Troy, which is within the proposed primary service area, and has since 1943, except for 11 years from 1968 to 1979. He is a member of the local zoning committee. He has also participated in other civic groups and belonged to a local church. Mr. Roling has been employed as a broadcaster since 1968. Mr. Gilchrist has lived in Troy since 1930. He belongs to a church, the American Legion, and a government committee. Mr. Gilchrist has been a broadcaster since 1946. Mr. Dudley lives in Brantley, Alabama, outside the proposed primary service area. However, he works within the proposed service area at Troy's current radio station and from 1947 to 1963 he lived in Troy, which is within the proposed primary service area of the station. Since 1979, Mr. Dudley has belonged to the American Legion in Troy, a county blood program, the Troy Exchange Club, the Troy Chamber of Commerce, United Appeal, and a government committee. He has worked full time at a radio station since 1951.

62. Sunbelt and Troy are equal on quantitative integration. Both propose to run the station with persons who control the applicant and will manage the station and set policy. Sunbelt's owner, Osbern Henley, is not qualitatively the same as Troy's owners. Two of Troy's owners have lived in the proposed service area for a long time: Mr. Roling has lived in the service area continuously since 1979, for 46 years altogether. Mr. Gilchrist has lived in the service area for 60 years. Mr. Dudley has not lived

in the service area since 1963 but for the 16 preceding years he did and he continues to spend each working day within the service area. All three of Troy's owners have combined their presence in the service area with civic activities to a greater degree than Sunbelt's Henley. All of Troy's stockholders are long time broadcasters. Sunbelt's Henley has seven years of broadcast experience (some of which appears to be part-time), compared to Dudley's 40 years, Gilchrist's 44 years, and Rolings 22 years. While Sunbelt's general partner, who holds all the control of the applicant, will live within the service area and has for five years, Troy's owners have a longer association with the service area. They have lived there longer, and participated in civic activities to a greater degree. The fact that Mr. Dudley has not lived in the service area for a number of years, is less important because he spends each working day there and he participates in its civic activities. *See Ronald Sorenson*, 6 FCC Rcd 1952, 1953 (1991). Troy has shown a greater likelihood of knowledge of and interest in the service area because of the longtime residence and association its principals have had with the service area and their participation in civic activities. Troy also has greater broadcast experience than Sunbelt.

63. Both Troy and Sunbelt propose auxiliary power. Overall coverage proposals are about the same. Sunbelt is entitled to a very slight preference for its proposed service to underserved areas. Sunbelt will provide a fourth service to about 2,000 people, or about twice the number provided by Troy. While this factor makes the comparative difference very close, it is not sufficient to outweigh Troy's qualitative integration preference since a slight integration preference outweighs a minimal coverage preference. *Ronald Sorenson*, 5 FCC Rcd 3144, 3147 (Rev. Bd. 1990), *reversed on other grounds*, 6 FCC Rcd 1952 (1991). Troy is also to be preferred over Sunbelt on diversification of interests in the mass media. Troy's principals promise to divest their interests in their station at Troy. Sunbelt's Henley became the manager and chief engineer of WDAU-TV, Ozark, Alabama on March 15, 1991. Mr. Henley failed to notify the Commission within 30 days that he would end his association with WDAU-TV. For that reason Troy is to be favored over Sunbelt on diversification of interests in the mass media. Overall, Troy is comparatively better than Sunbelt; the public interest would be served by a grant of Troy's application.

ACCORDINGLY, IT IS ORDERED that the motion to reopen the record, filed September 16, 1991 by Ralph W. Black, Jr. IS DENIED.

IT IS FURTHER ORDERED that the motion to dismiss, filed July 16, 1991 by Troy Broadcasting Corporation IS DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the applications of Sunbelt Limited Partnership (File No. BPH-880308ME) and Ralph W. Black, Jr. (File No. BPH-880310MT) ARE DENIED and the application of Troy Broadcasting Corp. (File No. BPH-880310MJ) for a construction permit for a new commercial FM station on Channel 234A in Brundidge, Alabama IS GRANTED conditioned on divestment of all ownership interest in WTBF(AM) before initiating program test authority.[3]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] Troy urges that Mr. Crawley gave inconsistent testimony about the change. Troy mischaracterizes Mr. Crawley's testimony. Mr. Crawley said he talked with Mr. Henley and Mr. Borsari about the change and that they both told him it would be better for the application. Tr. 155-59. Mr. Henley originally spoke with Mr. Borsari about changing to a partnership and Mr. Henley asked Mr. Borsari to talk with Mr. Crawley because he is a lawyer. Tr. 68. Troy mischaracterizes the testimony when it urges that it is inconsistent. Mr. Crawley asked Mr. Henley to talk with Mr. Borsari and he did. Tr. 68. Troy's questions appear to create inconsistencies only because they are never placed in a time frame, nor do Troy's questions ever establish the sequence of events that led to the partnership agreement.

[2] Black argues that because the limited partners are supplying the money for the proposal, they will control the business. That is not a proposition that is self-evident in a limited partnership. As Sunbelt urges, the role of limited partners is to invest. Legitimate general partners bring their business and organizational skills to the partnership and, if they are good at what they purport to do, they make money for the investors, the limited partners. Mr. Henley appears to be able to do that. He organized the project and he has managed a broadcast station for many years. Without more, Black's argument carries no meaning in the context of Sunbelt's proposal.

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-199

In the Matter of

Houston Area Public
Safety Plan

ORDER

Adopted: September 25, 1991; Released: October 7, 1991

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On April 11, 1991, Region 51 (Houston) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region.

2. The Houston plan was placed on Public Notice for comments on June 28, 1991, 56 FR 31128 (July 9, 1991). The Commission received one comment from The City of Pasadena, Texas (Pasadena) and no reply comments.

3. Pasadena had two concerns. First, it was concerned that the appeal procedures established no time limits for action by the Regional Review Committee. Second, it stated that the plan does not state whether frequencies which have been applied for but remain unassigned due to denial and pending appeal are considered unassigned. In both instances, Pasadena admits that experience may prove both of these concerns to be unfounded.

4. We have reviewed the plan submitted for Region 51 and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Houston. We agree with Pasadena that the concerns it raised are unlikely to occur. If issues such as those raised by Pasadena do arise, they will be handled on a case-by-base basis.

5. Therefore, we accept the Houston Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in the Houston area may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-286

In re Applications of

CALIFORNIA STATE UNIVERSITY, LONG BEACH FOUNDATION — File No. BRED-900801XT

For Renewal of License of
Station KLON(FM)
Long Beach, California

ST. IGNATIUS RETREAT ASSOCIATION — File No. BPED-901031ME

For A Construction Permit
For a New Noncommercial
FM Station
Long Beach, California

HEARING DESIGNATION ORDER

Adopted: September 25, 1991; Released: October 7, 1991

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration the above-captioned mutually exclusive applications of California State University, Long Beach Foundation ("CSU") for renewal of license for Station KLON(FM), Long Beach, California, and St. Ignatius Retreat Association ("St. Ignatius") for a construction permit for a new noncommercial educational FM station on 88.1 MHz, the frequency presently occupied by KLON(FM).

PETITION TO DENY

2. On March 19, 1991, CSU filed a Petition to Dismiss or Deny ("Petition") directed against St. Ignatius' above-captioned application. On March 22, 1991, and May 13, 1991, CSU filed supplements thereto. No opposition has been filed. For the reasons which follow, however, the Petition is denied.

3. CSU urges denial of St. Ignatius' application because it claims that St. Ignatius is not eligible to be a noncommercial educational licensee. In Section II, Item 1, page 2 of its application St. Ignatius states that it is a "private nonprofit educational institution." CSU disputes this, and St. Ignatius provides no additional evidence of its eligibility. Indeed, St. Ignatius has failed to provide the description of its planned programming required by Section IV of the application form. Although St. Ignatius refers to "Exhibit A", no such exhibit is appended to any copy of St. Ignatius' application filed with the Commission. Thus, we are unable to make a determination that St. Ignatius is a qualified educational organization proposing an acceptable educational format in compliance with 47 C.F.R. Section 73.503. For this reason, further inquiry is necessary. The proper approach, however, is to afford St. Ignatius an opportunity to establish its eligibility. Rather than denying or dismissing its application, an issue will be specified. In addition, St. Ignatius will be required to file an amendment with the Administrative Law Judge within 30 days of the release of this Order consisting of the program service statement required by Section IV of FCC Form 340 (May 1989). We will not add a misrepresentation issue against St. Ignatius, for the Petition does not make a *prima facie* showing that St. Ignatius intended to deceive the Commission with regard to its eligibility.

4. St. Ignatius proposes to use CSU's existing transmitter site for KLON(FM). In *First Report and Order in BC Docket 81-742 (Prevention of Abuses of the Renewal Process)* ("*First Report and Order*"), 4 FCC Rcd 4780, 4788-89 (1989), the Commission announced that it will no longer presume that an incumbent's transmitter site would be available to a successful challenger in a comparative renewal proceeding. The Commission further stated that the policy change would be applied to applications pending on the effective date of the *First Report and Order*, as was St. Ignatius' application, as well as to all prospective applicants. Such applicants were directed to amend their applications to show reasonable assurance of site availability, or specify different facilities. 4 FCC Rcd at 4789. St. Ignatius has not amended its application. Thus, and in accordance with the *First Report and Order*, at 4789, a site availability issue will be specified. In its Petition, CSU argues that St. Ignatius' application should be dismissed because it lacks reasonable assurance of the availability of its site. The *First Report and Order* makes clear, however, that where, as here, an applicant had specified the incumbent's site, and failed to amend to provide reasonable assurance or to specify a new site, a site availability issue will be specified. 4 FCC Rcd at 4789. The burden is on the applicant to submit the required amendment. Therefore, at this time we need not reach the question of whether KLON's site is available to St. Ignatius. We are specifying a site availability issue without prejudice to CSU's right to renew its request for dismissal of St. Ignatius' application by filing an appropriate motion with the Administrative Law Judge should St. Ignatius fail to cure the deficiency post-designation. We will not add a misrepresentation issue against St. Ignatius, for the Petition does not make a *prima facie* showing that St. Ignatius intended to deceive the Commission by specifying KLON's site.

5. Engineering analysis of St. Ignatius' application indicates that, in the area immediately surrounding the proposed tower, the combined operation of the proposed facilities and KSKQ-FM may significantly exceed the ANSI guidelines for human exposure to radio frequency ("RF") radiation, as outlined in OST Bulletin No. 65, (October 1985). Consequently, we are concerned that St. Ignatius may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. Section 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. Section 1.1307

criteria, the applicant must then submit an Environmental Assessment ("EA") containing the information delineated in 47 C.F.R. Section 1.1311. 47 C.F.R. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since St. Ignatius' proposal may have a significant environmental impact as defined by 47 C.F.R. Section 1.1307, St. Ignatius will be required to submit the environmental impact information described in 47 C.F.R. Section 1.1311. This study must include the effects of the proposed operation and all nearby RF sources. In this regard, if the site is presently fenced in compliance with the guidelines, St. Ignatius is required to so state and give the distance from the base of the tower to the fence. Accordingly, St. Ignatius will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. Section 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the EA, that St. Ignatius' proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the Presiding Judge shall thereafter not consider the environmental effects of the proposal. *See* 47 C.F.R. Section 1.1308(d). To the extent that CSU's Petition argues that St. Ignatius' application must be dismissed for failing to address the environmental impact of its proposal, we disagree. Indeed, 47 C.F.R. Section 1.1307(c) specifically contemplates that an applicant in St. Ignatius' posture may be asked to submit environmental impact information.

6. Finally, CSU's Petition argues that St. Ignatius' application must be dismissed as patently defective and incomplete. In addition to the deficiencies discussed above, CSU points to alleged inconsistencies between Section II of St. Ignatius' application and information on file with the Secretary of State of California. Further, CSU attacks the legibility and sufficiency of St. Ignatius' contour map, and the completeness of its allocation study. Suffice it to say that we have been able to evaluate St. Ignatius' application adequately. The errors alleged by CSU, even if true, would not render the application patently defective or incomplete. *See Statement of Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, 56 RR 2d 776 (1984).

7. For the reasons set forth in the foregoing discussion, CSU's Petition is denied.

OTHER MATTERS

8. *CSU.* Our engineering study indicates that CSU failed to address the matter of how it proposes to resolve any RF exposure to workers on its tower. *See* 47 C.F.R. § 1/1307(b). Consequently, we are concerned that CSU may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since CSU failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally,* OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radio Frequency Radiation," at 28. CSU will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessment, that the CSU proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding Administrative Law Judge shall thereafter not consider the environmental effects of the proposal. *See* 47 C.F.R. § 1.1308(d).

9. *St. Ignatius.* The applicant proposes to mount its antenna on an existing tower owned by the California State University Long Beach Foundation, the licensee of KLON(FM), Long Beach, California. St. Ignatius has indicated that the height of this tower is 133 feet above ground and 493 feet above mean sea level. However, Commission records indicate that the tower, as currently approved by the Federal Aviation Administration ("FAA"), is 136 feet above ground and 496 feet above mean sea level. Accordingly, an air hazard issue will be specified. However, the designation of an air hazard issue in this instance does not necessarily imply that the facility can not be approved. The purpose of the issue is to notify all parties, including the FAA, of the discrepancy. In general, changes to tower heights or coordinates require the concurrence of the FAA before the Commission will issue a construction permit. The fact that the FAA has approved a facility for a higher height does not eliminate the need for resolving this discrepancy since such a change, under some circumstances, modifies the painting and lighting requirements for the tower structure.

10. *Share-Time.* Neither of the applicants has indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue

is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent *Order*, upon the following issues:

(1) To determine whether St. Ignatius is a qualified educational organization as required by 47 C.F.R. Section 73.503(a);

(2) To determine whether St. Ignatius has reasonable assurance that the transmitter site specified will be available to it;

(3) To determine whether there is a reasonable possibility that the tower height and location proposed by St. Ignatius would constitute a hazard to air navigation.

(4) If a final environmental impact statement is issued with respect to either applicant in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. Sections 1.1301-1319.

(5) To determine whether a share-time arrangement between CSU and St. Ignatius would result in the most effective use of the specified channel and thus better serve the public interest, and, if so, the terms and conditions of the arrangement;

(6) To determine: (a) the extent to which the proposed operation of CSU and the proposed operation of St. Ignatius will be integrated into the overall cultural and educational objectives of the respective applicants; and (b) whether other factors in the record demonstrate that one applicant will provide a superior noncommercial radio broadcast service.

(7) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That, in accordance with paragraph 2 above, St. Ignatius shall file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order which contains the information required by Section IV of FCC Form 340.

14. IT IS FURTHER ORDERED, That, in accordance with paragraphs 4 and 7 above, CSU and St. Ignatius shall submit the environmental assessments required by 47 C.F.R. Section 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

15. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

16. IT IS FURTHER ORDERED, That, in light of the above discussion, the Petition to Dismiss or Deny filed by CSU with respect to St. Ignatius' application IS DENIED.

17. IT IS FURTHER ORDERED, That, a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of an opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give NOTICE of the hearing within the time and in the manner prescribed, and shall ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE CO., INC. File No. I-T-C-91-180

Application for authority to provide packet switching service between Hawaii and various overseas points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 30, 1991; Released: October 8, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international packet switching service between Hawaii, on the one hand, and Belgium, Egypt, French Polynesia and Vanuatu, on the other hand, by Hawaiian Telephone Co., Inc. (HTC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-180 IS GRANTED, and HTC is authorized to provide international packet switching service, on a transit basis via facilities provided by Sprint International System Services (Sprint ISS) and AT&T, between Hawaii, on the one hand, and Belgium, Egypt, French Polynesia and Vanautu, on the other hand.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between HTC and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon its adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-91-181

Application for authority to acquire and operate facilities for service between the U.S. and Suriname.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 30, 1991; Released: October 8, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to the Suriname by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-181 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 40 voice-grade satellite circuits between the Andover, Maine earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Suriname furnished by MCI's correspondent in Suriname;

b. use said facilities to provide MCI's regularly authorized services between the U.S. and Suriname and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Suriname and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NOS COMMUNICATIONS, INC. File No. I-T-C-91-183

Application for authority to operate as an international resale carrier.

BUSINESS CHOICE NETWORK, INC. File No. I-T-C-91-184

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 30, 1991; Released: October 8, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by NOS Communications, Inc. (NOS) and Business Choice Network, Inc. (BCN).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-183 and I-T-C-91-184 ARE GRANTED; and

a. NOS is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1 between the U.S. and the international points listed in those tariffs; and

b. BCN is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariff F.C.C. No. 1 between the U.S. and the international points listed in that tariff.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US WATS, INC. File No. I-T-C-91-186

Application for authority to operate
as an international resale carrier.

CAPITAL NETWORK SYSTEM, INC. File No. I-T-C-91-187

Application for authority to operate
as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 30, 1991; Released: October 8, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by US WATS, Inc. (WATS) and Capital Network Systems, Inc. (CNS).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-186 and I-T-C-91-187 ARE GRANTED; and

a. WATS is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, US Sprint's Tariff F.C.C. No. 5, RCI's Tariff F.C.C. No. 2 and FTC's Tariff F.C.C. No. 23 between the U.S. and the international points listed in those tariffs; and

b. CNS is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WEST COAST TELECOMMUNICATIONS, INC. File No. I-T-C-91-193

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 30, 1991; Released: October 8, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by West Coast Telecommunications, Inc. (WCT).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-193 IS GRANTED, and WCT is authorized to provide international switched voice service by the resale of the international switched voice service set forth in MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-287

In re Applications of

BIBLE BROADCASTING NETWORK, INC. (hereafter "Network") File No. BPED-900730MH

NORTH CENTRAL KANSAS BROADCASTING, INC. (hereafter "Central") File No. BPED-901105MK

For Construction Permit for a
New Noncommercial Educational FM
Station on Channel 214A
in Salina, Kansas

HEARING DESIGNATION ORDER

Adopted: September 26, 1991; Released: October 8, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new noncommercial educational FM station.

2. *Network.* Applicant has omitted Page 2 (Section II, "Legal Qualifications") from its Form 301. The information required by this page does not affect the tenderability or acceptability of Network's application. However, Network will be required to amend its application by submitting page 2 of its application to the presiding Administrative Law Judge.

3. *Share-time Arrangement.* Neither of the applicants has indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement among themselves.

4. Inasmuch as it appears that there would be a significant difference in the size of the areas which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available non-commercial educational FM signals within the respective service areas.

5. *Late-Filed Amendments.* Network petitioned for leave to amend its application on April 5, May 3, and June 17, 1991. The accompanying amendments were filed after March 19, 1991, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

2. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That Network shall file the amendment, as specified in Paragraph 2 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Network ARE GRANTED and the corresponding April 5, May 3, and June 17, 1991 amendments ARE ACCEPTED to the extent indicated in paragraph 5 above.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-288

In re Applications of

REIR BROADCASTING COMPANY, INC. (hereinafter "Reir") File No. BPH-900806MI

KBSC BROADCAST LIMITED PARTNERSHIP (hereinafter "KBSC") File No. BPH-900828MK

For Construction Permit
for a New FM Station on Channel 260C1
in Bozeman, Montana

HEARING DESIGNATION ORDER

Adopted: September 26, 1991; Released: October 8, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Reir.* In response to Item 2, Section VII of FCC Form 301, Reir has certified that the site proposed in its application will be available to the applicant for the applicant's intended purpose. Additionally, in Item 3 of Section V-B, Reir has indicated that it proposes to mount it antenna on an existing tower on which currently are the antennas of KBOZ-FM and KGVW-FM. Neither Commission records nor the application indicate whether Reir is the owner of this tower. In such a situation, applicants must submit a response to Item 3, Section VII, indicating that the applicant has contacted the tower owner and has reasonable assurance that the tower is available. Reir has failed to respond to Item 3. Accordingly, a site availability issue will be specified.

3. *KBSZ.* The Commission requires that if there are five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although KBSZ has filed such statement, it is deficient. KBSZ has failed to list the name or title of the individual responsible for implementation of its hiring and promotion policies. Accordingly, KBSZ will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

4. *Other Matters.* Both applicants propose to sidemount their antennas on existing towers. Our engineering study indicates that these proposals may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that the applicants may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since the applicants' proposals may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, they will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. These studies must include the effects of all of the RF sources on and in the vicinity of their towers. In this regard, if the site is presently fenced in compliance with the guidelines, the applicants are required to so state and give the distance from the base of the tower to the fence. Accordingly, the applicants will be required to file, within 30 days of the release of this Order, Environmental Assessments with the presiding Administrative Law Judge. In addition, copies must be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

5. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Reir has reasonable assurance that the transmitter site specified will be available to it.

2. If a final environmental impact statement is issued with respect to either applicant in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if either.

8. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, KBSZ shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

9. IT IS FURTHER ORDERED, That in accordance with paragraphs four, hereinabove, both applicants shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157,160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-228

In the Matter of

Illinois Public Safety Plan

ORDER

Adopted: September 30, 1991; Released: October 8, 1991

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On March 29, 1991, Region 13 (Illinois) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Illinois. On July 15, 1991, Illinois filed revisions to the plan, based on conversations with the Commission's staff.

2. The Illinois plan was placed on Public Notice for comments on July 31, 1991, 56 FR 37552 (August 7, 1991). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Illinois and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Illinois.

4. Therefore, we accept the Illinois Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Illinois may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-91-088

For authority pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to upgrade its Southbury, Connecticut ground earth station (WA-28) facilities with Inmarsat Standard C capability and to provide Inmarsat Standard C services in the Atlantic Ocean Region-West

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-91-089

For authority pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to upgrade its Santa Paula, California ground earth station (KA-31) facilities with Inmarsat Standard C capability and to provide Inmarsat Standard C services in the Pacific Ocean Region

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-91-022

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire an indefeasible right of user interest in and operate one voice-grade half-circuit in Pacific Ocean undersea cable facilities for use in connection with the provision of interim Inmarsat Standard C services, and to restore regular maritime services

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-90-186

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire an indefeasible right of user interest in and operate one voice-grade half-circuit in the TAT-7 transatlantic cable for use in connection with the provision of interim Inmarsat Standard C services, and to restore regular maritime services

MEMORANDUM, OPINION, ORDER AND AUTHORIZATION

Adopted: September 30, 1991; Released: October 9, 1991

By the Chief, International Facilities Division:

1. On April 5, 1991, the Communications Satellite Corporation (Comsat) filed the above-captioned applications File Nos. I-T-C-91-088 and I-T-C-91-089 requesting authority pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978, 47 U.S.C. § 753(c), and Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, to provide Inmarsat Standard C (C-link) maritime satellite services in the Atlantic Ocean Region-West (AOR-W) and Pacific Ocean Region (POR) and to upgrade the Southbury, Connecticut, ground earth station (GES) (WA-28) and Santa Paula, California, GES (KA-31) with Inmarsat Standard C capability. These two applications were placed on public notice on April 17, 1991. American Mobile Satellite Corporation (AMSC) filed a petition to deny on May 20, 1991. Comsat filed a letter of clarification, and AMSC filed a letter withdrawing its petition to deny on June 6, 1991.

2. On September 14, 1990, Comsat filed application File No. I-T-C-90-186 requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire an indefeasible right of user interest (IRU) in and operate one voice-grade half-circuit in the TAT-7 transatlantic undersea cable for use in connection with the provision of interim Inmarsat Standard C services, and to restore regular maritime services. On October 25, 1990, Comsat filed application File No. I-T-C-91-022 requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire an IRU in and operate one voice-grade half-circuit in Pacific Ocean undersea cable facilities for use in connection with the provision of interim Inmarsat Standard C services, and to restore regular maritime services. These applications were placed on public notice on September 26, 1990, and October 31, 1990, respectively. IDB Aero-Nautical Communications, Inc. (IDB-A), filed a petition to deny in part the application File No. I-T-C-91-022 on November 30, 1990. Comsat filed an opposition on December 19, 1990, and IDB-A filed a letter withdrawing its petition on July 15, 1991. For the reasons set forth below, we grant the four applications insofar as they request authority for maritime services, subject to certain conditions. We defer consideration of the use of Inmarsat

Standard C for land mobile satellite service (LMSS) to Comsat's pending application File No. I-T-C-91-139, and dismiss Comsat's request to use Inmarsat Standard C for international aeronautical mobile satellite service.

3. In applications File Nos. I-T-C-91-088 and I-T-C-91-089, Comsat sought authority to install the control and channelization equipment at Southbury and Santa Paula necessary for the full provision of Inmarsat Standard C maritime satellite service, aeronautical satellite services to aircraft in international flight and certain international LMSS and to provide Inmarsat Standard C service in the AOR-W and POR via the Southbury and Santa Paula GESs and the Inmarsat first and second generation satellites.[1]

4. Comsat states that Inmarsat Standard C service is a digital, message-based store and forward communications system. Ship-to-shore messages would originate through an Inmarsat Standard C terminal using an electronic keyboard device, microcomputer or telex machine and. after transiting the Inmarsat satellite and Comsat GES and Comsat store and forward message switch, would terminate via telex, electronic mail, or switched data service. Shore-to-ship messages would similarly originate over the public telex network, X.25 public data networks or the public switched network before entering the store and forward message switch for ultimate transmission to ships. Comsat also asks to provide Inmarsat Standard C international LMSS to mobile terminals in foreign countries on a secondary basis.

5. Comsat further proposes to acquire IRUs in and operate one voice-grade half-circuit in each of the following cables: the HAW-3/TPC-2/0LUHO/ASEAN P-S transpacific cable and the TAT-7 transatlantic cable, facility 1669, Channel 7. It plans to use these facilities to provide the transoceanic links in its interim POR and AOR Inmarsat Standard C service in the shore-to-ship direction (see n.1) and to provide access to automatic restoration capacity for the Santa Paula and Southbury GESs. Thus, for restoration, Comsat could route its POR telex traffic through Singapore Telecom's GES in the event that the Santa Paula GES should experience a service interruption, and its AOR-West traffic through British Telecom's Goonhilly GES in the event that the Southbury GES should experience a service interruption.

6. Applications File Nos. I-T-C-91-088 and I-T-C-91-089 state that the equipment to be installed at the GESs is composed of two subsystems – the Communications Subsystem and the Message Processing Subsystem. The total cost of the Inmarsat Standard C GES equipment is estimated to be $1,900,000 per GES. Comsat states that Inmarsat Standard C service will be available pursuant to cost-based tariffs which Comsat will file at the FCC in the near future. Applications File Nos. I-T-C-90-186 and I-T-C-91-022 state that the IRUs will be acquired from AT&T pursuant to the standard terms for IRUs in those cable facilities, plus a charge of 8,500 gold francs per month (approximately $3,860) for administration by Singapore Telecom and 1241 SDR per month (approximately $1,725) for administration by Telecom Denmark (for interim service). The charge that would be assessed by British Telecom for restoration service was not stated.

7. Comsat states that the size, portability and low cost of the Inmarsat Standard C terminal will enable the establishment of a high quality satellite communications link at any time and extend the advantages and reliability of satellite communications in the maritime environment. According to Comsat, small ships will be able to make contact and be contacted at any time and place because of the low weight and small size of the SES equipment, considerably increasing safety. For larger ships, Comsat predicts that Inmarsat Standard C may serve as the primary non-voice communications system. It maintains that Inmarsat Standard C service will also enable it to begin promoting the use of the new Inmarsat Standard C technology and developing the U.S. market for such service with consequent benefits to maritime safety and communications efficiency as well as to U.S. competitiveness in the provision of this service. Comsat believes that Inmarsat Standard C service will play a major role in the expansion of the competitive marketplace. Comsat further states that acquisition of the proposed undersea circuits will enable it to provide automatic telex restoration capacity for the Santa Paula and Southbury GESs and will result in significant cost savings in providing the interim POR and AOR Inmarsat Standard C service.

8. We conclude that it will be in the public interest to allow Comsat to provide Inmarsat Standard C service. Inmarsat Standard C service will make available to some maritime users a type of communication not previously available. The record in this proceeding fails to demonstrate any reason for denial of these applications. Furthermore, we believe that U.S. policy should be designed to ensure timely and effective U.S. entry into the markets for new services. We conclude that this goal will be furthered by grant of the instant applications. We also find that it will be in the public interest to allow Comsat to acquire the IRUs in cable facilities for use in connection with the provision of interim Inmarsat-C services, and to restore regular maritime services. These facilities will alleviate the risk of delays due to outages and result in lower costs to customers.

9. In File No. I-T-C-91-139, Comsat has requested blanket authority to provide international LMSS via the Inmarsat system and its regularly authorized GESs. Because the issue of Inmarsat use for international LMSS will be considered in File No. I-T-C-91-139, we need not here address Comsat's request to provide Inmarsat Standard C LMSS. We therefore defer consideration of this issue to File No. I-T-C-91-139. Furthermore, with regard to Comsat's request to provide Inmarsat Standard C aeronautical service to aircraft in international flight, we note that Comsat refers to this as a "potential" service[2] that "may be used to provide certain aeronautical communications . . . . If this service materializes, it could be initially provided with Inmarsat C signals."[3] No further information is provided and Comsat has removed its references to aeronautical service from its ground earth station applications.[4] We find that Comsat's proposed use of Inmarsat Standard C service for international aeronautical mobile satellite service is too speculative, and we dismiss it without prejudice as premature. Comsat may file a request for this service at a later time in a separate application.

10. Accordingly, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. § 753(c), IT IS ORDERED that the applications of the Communications Satellite Corporation, File Nos. I-T-C-91-088 and I-T-C-91-089, ARE GRANTED IN PART and Comsat is authorized to provide Inmarsat Standard C (C-link) satellite services described herein in the Atlantic Ocean Region-West and Pacific Ocean Region and to upgrade the

Southbury, Connecticut, ground earth station (WA-28) and Santa Paula, California, ground earth station (KA-31) with Inmarsat Standard C capability.

11. IT IS FURTHER ORDERED that Comsat's proposed use of Inmarsat Standard C service for international aeronautical mobile satellite service under File Nos. I-T-C-91-088 and I-T-C-91-089 is hereby dismissed without prejudice.

12. IT IS FURTHER ORDERED that Comsat's request to provide international LMSS via Inmarsat is deferred and will be considered in Application File No. I-T-C-91-139.

13. IT IS FURTHER ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, that the applications of the Communications Satellite Corporation, File Nos. I-T-C-90-186 and I-T-C-91-022, ARE GRANTED and Comsat is authorized to acquire indefeasible rights of user interest in and operate one voice-grade half-circuit in the TAT-7 transatlantic cable, facility 1669, Channel 7 and the HAW-3/TPC-2/0LUHO/ASEAN P-S transpacific cable, respectively, for use in connection with the provision of interim Inmarsat-C services, and to restore regular maritime services in the event that Comsat's GESs experience service interruptions.

14. IT IS FURTHER ORDERED that Comsat shall, pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, file a tariff for the services authorized in this order before offering services to the public.

15. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for Reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Comsat states that it will provide C-link services entirely within the frequency bands allocated for maritime services. Comsat further states that Inmarsat C transportable or ship earth stations (SESs) will communicate in the transmit frequency bands 1626.5-1646.5 MHz and the receive bands 1530-1545 MHz. The GESs will transmit to the first generation satellites on 6417.5-6425 MHz and receive on 4192.5-4200 MHz. They will transmit to the second generation satellites on 6424-6440 MHz and receive in the band 3600-3620 MHz.

[2] Comsat Application at 9.

[3] *Id.* at n. 3.

[4] *See* letter from Robert A. Mansbach, Comsat, to International Facilities Division, Common Carrier Bureau, dated September 25, 1991, in File Nos. CSG-91-129-P/L and CSG-91-130-P/L.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 9, 1991

Report No. DS-1127

NEW SATELLITE EARTH STATION APPLICATION FORM

FCC Form 493, "Application for Earth Station Authorization or for Modification of Station License," is now available for immediate use. As ordered in "Amendment of Part 25 of the Commission's Rules and Regulations to reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communications Services," (CC Docket No. 86-496), the new, more comprehensive Form 493 supersedes Form 403 and should be filed when applying for a new earth station license or registration or when applying to modify an existing earth station. Application fees must still be filed and Form 155 must accompany all applications requiring fees.

Any earth station application filed after November 15, 1991 using the old Form 403 will be returned as unacceptable for filing. Form 493 is available from the Satellite Radio Branch, or by direct order by dialing (202) 632-FORM.

Please contact Eric Muller at (202) 634-1859, or Georgia Mallari at (202) 634-1684 for further information.

FEDERAL COMMUNICATIONS COMMISSION

FCC 493
September 1991

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

Approved by OMB
3060-0460
Expires 05/31/94
Est. Avg. Burden Hrs. Per Response: 24 Hrs.

INSTRUCTIONS FOR COMPLETION OF FCC FORM 493
APPLICATION FOR EARTH STATION AUTHORIZATION OR FOR MODIFICATION OF STATION LICENSE

General Information and Instructions
A. FCC Form 493 is to be used to apply for a license to construct and/or operate a transmit/receive earth station, a transmit-only earth station; to register a domestic receive-only earth station; to license an international receive-only earth station; or to modify a granted license or registration. These licensing activities are restricted to the following satellite services:

Domestic Fixed-Satellite Service
International Fixed-Satellite Service
Radiodetermination-Satellite Service
Mobile-Satellite Service

Applicable Rules and Regulations
B. Before this application is prepared, the applicant should refer to Part 25 of the Rules and Regulations of the Commission, (Title 47, Code of Federal Regulations (CFR), Part 25) copies of which may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. Part 25 may require information to be filed with an application in addition to that specified in the application form. Applicant should make every effort to file a complete application in compliance with the Rules. Failure to do so can result in rejection or return of the application or a delay in the processing of the application. Use additional sheets only where necessary. All additional sheets must contain the applicant's name and the number of question to which it responds.

Number of Copies
C. All entries on the form shall be typed or legibly printed in ink. An original and two copies of the application must be submitted. Applicants filing for a 12/14 GHz VSAT Network should submit an original and five copies of each application.

Fees
D. A processing fee is required with this application. Please refer to either 47 CFR 1.1105, the Common Carrier Fee Filing Guide, or call (202) 632- **FEES** for appropriate fee. **DO NOT SEND CASH.** Payment may be made by check, bank draft, or single money order payable to: **Federal Communications Commission.**

Submission of Applications
E. Each application should be assembled with an Fee Processing Data Sheet (FCC 155 Form) stapled to the top of the application. Place the check on top of the Fee Processing Data Sheet. **Please do not staple the check to the application.** Required copies of applications should be clearly identified as "duplicate copy" and placed behind the original package. A copy of an application submitted for receipt purposes only should be placed at the bottom of the submission. Extraneous material and extra copies should be avoided at all times. Failure to abide by these instructions will delay the processing of your submission.

Addresses for Mail-In Applications
F(1) Applications for Domestic Earth Stations are to be mailed to:

Federal Communications Commission
Common Carrier Domestic Earth Stations
P.O. Box 358160
Pittsburgh, PA 15251-5160

(2) Applications for International Earth Stations are to be mailed to:

Federal Communications Commission
Common Carrier International
P.O. Box 358115
Pittsburgh, PA 15251-5115

Receive-Only Earth Station Registration
G. Receive-only earth stations may be registered with the Commission in order to protect them from interference from terrestrial microwave stations in the 4 GHz shared band pursuant to 47 CFR Sections 25.131 and 25.133. Registration results in the listing of an earth station at a specified location with interference levels agreed to during coordination. We will not accept applications for registration of receive-only earth stations in the 12 GHz band because downlinks in the fixed-satellite service are given primary allocation status in that band. Pursuant to 47 CFR Section 25.133(d), each registrant for a receive-only earth station must file a certificate that its facility is constructed and operating. Receive-only earth stations operating with INTELSAT space stations, international space stations or U.S. domestic and non-U.S. space stations for reception of services from other countries are required to be licensed except that earth stations used to receive INTELNET I services from INTELSAT space stations need not file for licenses.

Transmit/Receive Earth Station Applications
H. Pursuant to 47 CFR Section 25.113, construction permits are no longer required for certain transmit/receive earth stations. These include domestic satellite earth stations, international satellite earth stations operating with INTELSAT and INMARSAT and earth stations operating with international space

stations licensed pursuant to Establishing of Satellite Systems Providing International Communications, 50 FR 42266 (October 18, 1985), 101 FCC 2d 1201 (1985). A construction permit is required for all other earth station facilities. Construction of stations prior to the grant of a license is at the applicant's own risk. Pursuant to 47 CFR Section 25.133(b), each licensee for a transmitting station shall file a certification that its facility is constructed and in operation.

Notice to Individuals Required by the Privacy Act of 1974 and the Paperwork Reduction Act of 1980: 1. The information requested by this form will be used by Federal Communications Commission staff to determine eligibility for issuing authorizations in the use of frequency spectrum and to effect the provisions of regulatory responsibilities rendered the Commission by the Communications Act of 1934, as amended. Response to the information requested is required to obtain the requested authorization. Information requested by FCC 493 will be available to the public.

Public reporting burden for this collection of information is estimated to average 24 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Federal Communications Commission, Information Resources Branch, Room 416, Washington, D.C. 20554, and to Office of Management and Budget, Paperwork Reduction Project (3060-0480), Washington, D.C. 20503.

FCC 493
September 1991

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Approved by OMB 3060-0480 Expires 05/31/94
Est. Avg. Burden Hrs. Per Response: 24 Hrs.

FCC USE ONLY
File Number

Call Sign

APPLICATION FOR EARTH STATION AUTHORIZATION OR FOR MODIFICATION OF STATION LICENSE

Read Instructions Before Completing and For Information Regarding Public Burden Estimate

1. Name of Applicant (must be same as reported on FCC 430 Form, Licensee Qualification Report)

Mailing Street Address or P.O. Box, City, State and ZIP Code | (Area Code) Telephone Number

2. Contact Representative. Provide the following if the person to contact is other than applicant.

Name

Mailing Street Address or P.O. Box, City, State and ZIP Code | (Area Code) Telephone Number

3. Class of Station

a ☐ Fixed Earth Station
b ☐ Temporary Fixed Earth Station
c ☐ 12/14 GHz VSAT Network
d ☐ Mobile Earth Station
e ☐ Other (Specify):

4. Nature of Service

a ☐ Domestic Fixed-Satellite
b ☐ International Fixed-Satellite
c ☐ Radiodetermination-Satellite
d ☐ Mobile-Satellite
e ☐ Other (Specify):

5. Is developmental operation requested?
☐ YES ☐ NO

6(a) Type of Request

1 ☐ License for transmit/receive earth station
2 ☐ License for transmit-only earth station
3 ☐ Registration or License for receive-only earth station
4 ☐ Modification of License/Registration (Complete Items 7(a)-(c))

6(b) Number of Stations: ▶

7(a) Purpose of Proposed Modification

1 ☐ Change in emissions
2 ☐ Change in antenna
3 ☐ Change in location
4 ☐ Change in assigned frequencies
5 ☐ Change in points of communications
6 ☐ Change in range of satellite arc
7 ☐ Other (Specify):

(b) Call Sign of Station

(c) File No. of Current Authorization

8. Location (Number, Street, City, County, State and ZIP Code) and Telephone Number of Earth Station Site. (If temporary fixed or VSAT Network license, specify area of operation and point of contact - name and telephone number)

9. Latitude and Longitude
Deg. - Min. - Sec.
Lat. North
Long. West

10. Site Elevation (AMSL)
feet meters

11. Points of Communications (For satellites operating within the frequency bands and geostationary arc coordinated for these facilities, in most cases, the entry "ALSAT" is sufficient for Domestic Fixed-Satellite Service; for all other services each satellite must be listed).

12. Frequency Coordination Limits

(a) Frequency Limits	(b) Range of Satellite Arc		(c) Antenna Elevation Angle		(d) Earth Station Azmuth		(e) Maximum EIRP Density Toward the Horizon (dBW/4kHz)
	(i) Eastern Limit	(ii) Western Limit	(i) Eastern Limit	(ii) Western Limit	(i) Eastern Limit	(ii) Western Limit	

13. Transmitting Equipment

(a) No. of HPA's	(b) Manufacturer	(c) Model No.	(d) Maximum Power Output (watts)

14. Antenna Facilities (Corresponding line number in items 14 and 15 applies to same antenna)

Line No.	(a) Quantity	(b) TT&C*	(c) Manufacturer	(d) Model	(e) Size (meters)	(f) Type of Feed	(g) Gain Transmit and/or Receive (_____dBi at _____ GHz)
1							
2							
3							
4							

15. Antenna Heights (Measurements to be given in English and metric units)

Line No.	(h) Maximum Antenna Height Above Ground Level		(h) Maximum Antenna Height Above Mean Sea Level		(i) Building Height** Above Ground Level		(j) Maximum Antenna Height** Above Rooftop	
1	feet	meters	feet	meters	feet	meters	feet	meters
2	feet	meters	feet	meters	feet	meters	feet	meters
3	feet	meters	feet	meters	feet	meters	feet	meters
4	feet	meters	feet	meters	feet	meters	feet	meters

16. Particulars of Operation (Full particulars are required for each r.f. carrier)

(a) Frequency Bands (MHz)	(b) Antenna Polarization (H,V,L,R)	(c) Emission Designator	(d) Maximum EIRP (dBW)	(e) Maximum EIRP Density (dBW/4kHz)	(f) Description of Modulation

17. Receiving System Noise Temperature: (in kelvin with applicable antenna elevation angle and frequency)

*Check only for antennas used for satellite Telemetry, Tracking and Control (TT&C).

**Attach sketch of site or exemption. See 47 CFR Part 17.

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September 1991

Place an "X" in the appropriate column.	YES	NO
18. Does the proposed antenna(s) comply with the antenna gain patterns specified in Section 25.209(a) and (b) as demonstrated by the manufacturer's qualification measurements? ▶ Attach manufacturer's verification that the antenna complies with these patterns if not on file.		
19. Is the facility to be operated by remote control? ▶ If "YES," provide the location (street, city, county, state, zip code) and telephone number of the control point.		
20. Small Antenna Impact (a) Will an antenna less than 9 meters in diameter be used at this site to transmit to a fixed-satellite below 7075 MHz? ▶		
(b) Will an antenna less than 5 meters in diameter be used at this site to transmit to a fixed-satellite from 7075 MHz to 14.5 GHz? ▶		
(c) If the answer to (a) or (b) above is "YES", answer all of the following questions that apply to the proposed earth station facilities. (i) Transmissions in the band 5925-7075 MHz will be limited to a maximum bandwidth of _____ MHz and maximum EIRP density of _____ dBW/4kHz. (ii) Transmissions in the band 7075 MHz to 14.5 GHz will be limited to a maximum bandwidth of _____ MHz and maximum EIRP density of _____ dBW/4kHz. (iii) Will operation of this facility be governed by a previous small antenna authorization? ▶ If "YES", provide cite: _____ If "NO", attach small antenna analysis.		
21. Is the facility to be used to provide Radiodetermination-Satellite Service (RDSS) in the frequencies allocated for RDSS? ▶ If "YES", attach exhibit demonstrating that operations are compatible with other operations.		
22. Is the facility to be used to provide Mobile-Satellite Service (MSS) in the frequencies allocated for MSS? ▶ If "YES", attach exhibit demonstrating that facility is consistent with operations in these frequencies.		
23. Frequency Coordination (a) Is frequency coordination required? ▶ If "YES", attach a frequency coordination report.		
(b) Is coordination with another country required? ▶ If "YES", attach name of country and plot of coordination contours.		
24. FAA Notification - (See 47 CFR Part 17) Is FAA notification required for any of the new or modified structures proposed in this application? ▶ If "YES", attach a copy of FCC 854 form and/or the FAA's study regarding the potential hazard to aviation of the structure.		
25. Environmental Impact Would a commission grant of this application be an action which may have a significant environmental effect as defined by Section 1.1307 of the Commission's Rules? ▶ If "YES", submit the statement as required by Sections 1.1308 and 1.1311.		

26. Description. (Summarize the nature of the application and the services to be provided).

Place an "X" in the appropriate column.	YES	NO
27. Rule Waivers and Exceptions Is this application inconsistent with any of the Commission's Rules? ▶ If "YES", attach a copy of requests for waivers or exceptions with supporting documents.		
28. Eligibility (a) Is the applicant a foreign government or a representative thereof? ▶		
(b) Does the applicant meet the requirements of Section 310(b)(1), (2) and (3) of the Communications Act (47 USC 310(b)(1), (2) and (3))? ▶		
(c) Does the applicant meet the requirements of Section 310(b)(4) of the Communications Act (47 USC 310(b)(4))? If "NO", attach an exhibit explaining why grant is in the public interest. ▶		
29. Will the station be used to provide common carrier services? ▶		
30. Will the station be used for developmental purposes? If "YES", attach an exhibit detailing the developmental plan. ▶		
31. If transmitting antenna, will individual applicant, partner (in case of partnership) or full-time manager (in case of corporation) actively participate in the day-to-day management and operation of proposed facility? ▶ If "NO", submit an exhibit providing an explanation, and including a demonstration of how control over the facility will be retained.		
32. For transmitting antennas that provide domestic or international service, attach FCC 430 form, or if a complete and accurate FCC 430 form is already on file with the FCC give date filed: _____ Is FCC 430 form attached? ▶		

33. Exhibits. Identify the exhibits that are attached to this application.

Exhibit No.	
1	
2	
3	
4	
5	

34. **Certification of Person Responsible for Preparing Engineering Information in this Application.** I hereby certify that I am the technically qualified person responsible for preparation of the engineering information contained in this application, that I am familiar with Part 25 of the Commission's Rules, that I have either prepared or reviewed the engineering information submitted in this application, and that it is complete and accurate to the best of my knowledge.

Date	Typed Name of Person Signing	Signature

35. Certification of Applicant. The applicant waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a construction permit, if necessary, in accordance with this application. All statements made in the attached exhibits are a material part hereof and are incorporated herein as if set out in full in this application. The undersigned, individually and for the applicant, hereby certifies that the statements made in this application are true, complete and correct to the best of the signer's knowledge and belief, and are made in good faith.

Date	Typed Name of Person Signing	Signature

WILLFUL FALSE STATEMENTS MADE ON THIS APPLICATION ARE PUNISHABLE BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 1001), and/or **REVOCATION OF ANY AUTHORIZATION** (U.S. Code, Title 47, Section 312(a)(1)), and/or **FORFEITURE** (U.S. Code, Title 47, Section 503).

Notice to Individuals Required by the Privacy Act of 1974 and the Paperwork Reduction Act of 1980
The information requested by this form will be used by Federal Communications Commission staff to determine eligibility for issuing authorizations in the use of frequency spectrum and to effect the provisions of regulatory responsibilities rendered the Commission by the Communications Act of 1934, as amended. Response to the information requested is required to obtain the requested authorization. Information requested by this form will be available to the public. Public reporting burden for this collection of information is estimated to average 24 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Federal Communications Commission, Information Resources Branch, Room 416, Washington, D.C. 20554, and to Office of Management and Budget, Paperwork Reduction Project (3060-0480), Washington, D.C. 20503.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-289

In re Applications of

PEARCE BROADCASTING PARTNERSHIP (hereafter "Pearce") File No. BPH-900918MA

STEPHEN L. GRADICK (hereafter "Gradick") File No. BPH-900919MG

For Construction Permit
for a New FM Station on
Channel 251A (98.1MHz)
in Valley, Alabama

HEARING DESIGNATION ORDER

Adopted: September 26, 1991; Released: October 9, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Gradick.* 47 C.F.R. § 73.315(a) requires that an applicant provide a 3.16 mV/m signal to the entire proposed city of license. The FM Branch does not require a waiver of this requirement unless the proposed 3.16 mV/m (70 dBu) coverage falls below 80% of the area of the principal community. *See John R. Hughes,* 50 Fed. Reg. 5679 (February 11, 1985). *See also Southwest Communications, Inc.,* released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). Gradick has indicated that his 70 dBu contour will encompass 82% of the proposed community of license and thus a waiver of the Commission's city coverage rule is not required. Gradick further states that a waiver is requested in the event the Commission determines that it is necessary. An engineering study reveals, however, that Gradick's 3.16 mV/m contour would only cover approximately 69% of the area of the proposed community of license. Furthermore, Gradick has failed to submit adequate justification for his waiver request. Accordingly, an appropriate issue will be specified below.

3. *Pearce, Gradick.* Both of the captioned applicants propose to locate their transmitting antennas on a new tower. Our engineering study indicates that Pearce and Gradick failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Pearce and Gradick failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally,* OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore Pearce and Gradick will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.,* 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.,* 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposal. *See* 47 C.F.R. § 1.1308(d).

4. *Gradick.* Gradick petitioned for leave to amend his application on January 30, 1991 and June 18, 1991. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether the proposal of Gradick would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.

2. If a final environmental impact statement is issued with respect to Pearce and Gradick in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That in accordance with paragraph 3 hereinabove, Pearce and Gradrick shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Gradick ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extend indicated herein.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-121

In the Matter of

Amendment of Part 73 of the
Commission's Rules to Permit
Short-Spaced FM Station Assignments
by Using Directional Antennas.

ERRATUM

Adopted: October 1, 1991; Released: October 9, 1991

By the Chief, Mass Media Bureau:

1. This action makes a minor correction to one of the recent rule amendments and extends the period before the effective date for all of the rule amendments adopted in the *Memorandum Opinion and Order (Memorandum)* of MM Docket No. 87-121 (FCC 91-273), August 28, 1991, and released on September 17, 1991. In response to petitions for reconsideration, the *Memorandum* reaffirmed the Commission's earlier decision to allow routine short-spaced FM broadcast station assignments, and adopted several petitioned refinements to the rules.

2. Adjacent channel offset frequency references in Rule Section 73.215(a)(2) were inadvertently published with "+" signs instead of the appropriate "±" signs to designate both above and below adjacencies. Therefore, the adjacent channel offset signs of Section 73.215(a)(2) are editorially corrected as reflected in the attached appendix. The period before the effective date is extended to allow the appropriate time between the date the rules were published in the Federal Register and their effective date. Accordingly, IT IS ORDERED THAT Section 73.215 IS AMENDED as set forth below in the appendix. IT IS FURTHER ORDERED THAT the effective date of the amendments to 47 C.F.R. Sections 73.207, 73.215, and 73.316 IS AMENDED to November 15, 1991.

3. This action is taken pursuant to authority found in Section 4(i) and 303(r) of the Commissions Act of 1934, as amended, and Sections 0.24(b) and 0.283 of the Commission's Rules (47 CFR Sections 0.24(b) and 0.283).

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 73.215 is amended by revising paragraph (a)(2) as follows:

Section 73.215 Contour protection for short-spaced assignments.

* * * * *

(a) * * *

(2) The interfering contours, for the purpose of this section, are defined as follows. For co-channel stations, the F(50,10) field strength along the interfering contour is 20 dB lower than the F(50,50) field strength along the protected contour for which overlap is prohibited. For first adjacent channel stations (± 200 kHz), the F(50,10) field strength along the interfering contour is 6 dB lower than the F(50,50) field strength along the protected contour for which overlap is prohibited. For both second and third adjacent channel stations (± 400 kHz and ± 600 kHz), the F(50,10) field strength along the interfering contour is 40 dB higher than the F(50,50) field strength along the protected contour for which overlap is prohibited.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-126

In the Matter of

Amendment of Section 73.202(b), RM-6669
Table of Allotments,
FM Broadcast Stations.
(Miramar Beach, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 27, 1991; Released: October 9, 1991

By the Assistant Chief, Allocations Branch:

1. Pursuant to the request of Carol Renee Carter ("Carter"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 4822 (1989), proposing the allotment of Channel 292A to Miramar Beach, Florida, as a first local FM service. Carter and Emerald Coast Communications, Inc. ("Emerald"), licensee of Station WWAV(FM), Channel 272A, Santa Rosa Beach, Florida, filed comments. Gulf Coast Broadcasting, Inc. ("Gulf") licensee of Station WMMK(FM), Destin, Florida, and Carter filed reply comments. [1]

2. The *Notice* raised the issue of whether Miramar Beach is a community for allotment purposes, since it is not listed in the 1980 Census. [2] In response, Carter states that Miramar Beach is clearly a community with defined boundaries whose residents share common interests and identity. She states that Miramar Beach is a community with a population of approximately 800 people located in the southern portion of Walton County. Carter contends that recent University of Florida population projections indicate that Miramar Beach may have a population of 5,000 people by the year 2000. Carter states that even though it is not incorporated, Miramar Beach is a South Walton County Voting precinct. She notes that Miramar Beach has a town hall. Carter states that a Miramar Beach fire station is under construction and will soon provide fire protection to the home owners of Miramar Beach. She states that Miramar Beach is served by two local churches, the Miramar Beach Faith Assembly and the Resurrection Catholic Church. She notes that there is a park in the community. She argues that South Walton Utility Company provides Miramar Beach with water and sewer service, and Warner Cable operates a cable television tower and relay site in Miramar Beach to provide the area with cable TV service. She notes that "many local civic groups including the Lions and Kiwanis Clubs" meet at the Sandestin Beach Resort. Carter states that the business community of Miramar Beach is also growing. Currently, there are three strip shopping centers which provide grocery items, fast food, designer fashions, and more. Two of the southeast's largest grocery chains, and two banks are located in Miramar Beach. She submits a number of photographs depicting the town hall, Miramar Beach street signs, and local facilities. Finally, Carter notes that Miramar Beach is located on the Gulf of Mexico and is susceptible to the loss of life and property if a major hurricane were to strike. The allotment of Channel 292A to Miramar Beach, she argues, could provide the community with much needed emergency information if a disaster of this magnitude was to strike. [3]

3. Emerald, in its comments, contends that Miramar Beach is a small strip of beach front property, the geographic size of which is uncertain. Emerald states that it was advised by the Walton County Supervisor of Elections that the geographic area of the Miramar Beach voting precinct is approximately six square miles, a larger area than the geographic/signage boundaries of Miramar Beach. Emerald contends that upon inquiry with local real estate agents, it was advised that a majority of the housing and apartment units within Miramar Beach are used for rental and are inhabited primarily by short term residents. Emerald contends that a subcontracted postal station designated as "Miramar Beach" exists, but this substation is located in a nearby resort area known as Sandestin. Emerald states that the mail for Miramar Beach is delivered through the U.S. Post Office in Destin, Florida. It argues that Miramar Beach has no elected officials, no city office, no fire or police department, no school system, and no city taxing authority. Emerald contends that all of the essential community and governmental services to the geographic area identified as Miramar Beach are provided by Walton County, or the nearby cities of Destin or Santa Rosa Beach, Florida. Emerald claims that it was able to locate only one strip shopping center that borders on the boundaries of Miramar Beach. Emerald also questions as to whether some or all of the

[1] Gulf filed a motion to strike portions of Carter's reply comments, claiming that the reply comments contain evidence of Miramar Beach's community status that Carter should have submitted in initial comments. Gulf argues that submission in reply comments deprives other parties of the right to address the merits of the evidence. Carter filed an objection, arguing that she was responding to issues in Emerald's comments. We deny Gulf's motion. Carter's reply comments constitute an appropriate response to Emerald's comments. Furthermore, even if we were to strike portions of Carter's reply comments, it would not change the decision reached herein.

[2] However, we note that Miramar Beach is listed in the 1990 Census as a Census Designated Place with a population of 1,644. *See* paragraph 6, *infra*.

[3] A Commission engineering analysis indicates that Miramar Beach, Florida, presently receives service from Station WMMK(FM), Channel 221A, Destin, Florida, Station WWAV, Channel 272A, Santa Rosa Beach, Florida, and Station WYZB(FM), Channel 288A, Mary Esther, Florida. Miramar Beach also receives service from the following AM daytime stations WWL, New Orleans, Louisiana (also provide nighttime service), WCNU, Crestview, Florida, WBZR, Destin, Florida, WNUE and WFTW, Fort Walton Beach, Florida, WGTX, Defuniak Springs, Florida, WFSH, Valparaiso-Niceville, Florida, WLTG, Panama City, Florida, WKGC, Panama City Beach, Florida and WJOE, Port St. Joe, Florida. Therefore, it appears that the community is well-served by reception services.

retail outlets in this center are within Miramar Beach. Emerald argues that Carter is subject to a "non-compete agreement," which prohibits her from engaging in any business, acquiring interest in a business, or becoming affiliated or providing service to any business, that competes with Emerald in Santa Rosa, Okaloosa, and Walton Counties, in Florida. Therefore, Emerald contends that Carter would not be able to apply for Channel 292A at Miramar Beach, if granted.

4. Carter states that the Commission has made it clear that the phrase "geographically identifiable" does not require that a community have definite borders, but simply that the members of the community reside in proximity at some locality, citing *Beacon Broadcasting*, 63 RR 2d 798 (1987). She includes letters from the Walton County Chamber of Commerce, a local real estate developer and the editor of a local newspaper attesting to the community's status. She argues that two of the community's borders are marked by signs on Highway 98. She includes a highway map and a Chamber of Commerce map depicting Miramar Beach. Carter states that although the limits of this unincorporated area may not be precisely defined, the community meets the Commission's requirements of geographic identifiability. Carter states that among what may be termed other "objective indicia" of community status are banks, a post office, shopping centers, churches, and social organizations, citing to *Ansley, Alabama*, 46 FR 58688, 58689 (1981). She includes an article from a local newspaper concerning Miramar Beach's post office. She notes the fact that Miramar Beach does not maintain its own school or library system does not alter the fact that it is a community. Carter argues that there are a "number of reasons" why the Non-Compete Agreement between Carter and Emerald should have no bearing on the Commission's decision to allot a channel to Miramar Beach, including the fact that the agreement does not preclude Carter from filing an application for a station. [4] Carter states that even if she could not file an application for a construction permit, others will apply "because Miramar Beach is an attractive, expanding community."

5. In reply comments, Gulf states that the very purpose of determining the existence of a "community" is to satisfy the Commission that the proposed station location has needs and concerns which may be met through appropriate programming, citing *Kent-Ravenna Broadcasting Co.*, 44 FCC 2603 (1961). Gulf states that Miramar Beach has no local government, no elected or appointed officials, and offers no municipal services to local residents. Police, fire, rescue, water, sewer, and trash collection services are provided by the local governments of either Destin City, South Walton County, or Santa Rosa Beach. There is not a single public or private school in Miramar Beach, and children residing in the area claimed by Carter to be Miramar Beach are required to attend school in either Destin or Fort Walton Beach. There is no chamber of commerce to organize businesses and promote local development, and residents who wish to join civic clubs must do so in Destin or Sandestin. Gulf goes on to state that Miramar Beach does not have a Post Office, but instead has a subcontracted rental box location. Miramar Beach does not have its own zip code or its own telephone exchange. Gulf maintains that the voting precinct cited by Carter is far larger than the area claimed to be Miramar Beach, and encompasses communities which surround Miramar Beach. Gulf argues that the population of Miramar Beach has for the last decade remained under 1,000 residents, thereby undercutting Carter's claim that it is a rapidly growing place.

6. After consideration of the information filed in this proceeding, we believe that Miramar Beach is a community for allotment purposes. Miramar Beach is listed in the 1990 U.S. Census as a Census Designated Place ("CDP") with a population of 1,644, and it is also listed in the 1991 Rand McNally Commercial Atlas as a separate community with a summer population of 1800. There is a strong presumption that a CDP is a community for allotment purposes. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88,101 (1982). Even if Miramar Beach was not listed in the 1990 Census, we would find that Miramar Beach is a community. Carter states that Miramar Beach is served by two local churches, the Miramar Beach Faith Assembly and the Resurrection Catholic Church, two banks, and some businesses. Carter submitted letters from the Walton County Chamber of Commerce, a local real estate developer and the editor of a local newspaper attesting to the community's status. In addition, Carter submits a number of photographs depicting a town hall, Miramar Beach street signs, and local facilities. Although Gulf maintains that Miramar Beach relies on Walton County and nearby communities for many of its local services, the Commission has stated that a municipality need not provide every public service such as the school district, fire department and police services on its own in order to merit community status. *See Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments (Semora, North Carolina)*, 5 FCC Rcd 934,935 (1990). Therefore, we find that Miramar Beach is a community for allotment purposes.

7. We believe that the public interest would be served by the allotment of Channel 292A to Miramar as that community's first local FM broadcast service. Channel 292A can be allotted to Miramar Beach in compliance with the minimum distance separation requirements with a site restriction of 2.4 kilometers (1.5 miles) east [5] to avoid a short-spacing to Station WKNU(FM), Channel 292A, Brewton, Alabama.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

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[4] We will not reach the arguments concerning the "non-compete agreement." This is a private agreement between the parties and is not a matter for Commission review.

[5] The coordinates for Channel 292A at Miramar Beach, Florida, are North Latitude 30-22-30 and West Longitude 86-20-00. Because this allotment is made as a result of a petition filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c) of the Commission's Rules with respect to Station WKNU(FM), Channel 292A, Brewton, Alabama, at coordinates 31-06-45 and 87-01-19. *See* 47 CFR 73.213(c).

City	Channel No.
Miramar Beach, Florida	292A

9. The window period for filing applications will open on **November 26, 1991,** and close on **December 26, 1991**.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-296

In the Matter of

Amendment of Section 73.202(b), RM-6090
Table of Allotments,
FM Broadcast Stations.
(Christiansted, Virgin Islands)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 27, 1991; Released: October 9, 1991

Comment Date: December 2, 1991
Reply Comment Date: December 17, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for rule making filed by St. Croix Wireless Co., Inc. ("St. Croix"), permittee of Station WAVI, Channel 228A, Christiansted, Virgin Islands, proposing the substitution of Channel 228B for Channel 232A at Christiansted, Virgin Islands, and modification of its Station WAVI construction permit to specify operation on Channel 228B. St. Croix states that it will apply for the channel, if allotted.

2. Station WAVI was formerly assigned to Channel 232A. On August 22, 1991, as a result of international negotiations, we modified the Station WAVI construction permit to specify operation on Channel 228A. *See Order* released September 5, 1991 (DA 91-1101). In view of this modification of the underlying construction permit, we are processing the petition for rule making as a request for Channel 228B for Channel 228A upgrade.

3. We believe that the public interest would be served by proposing the substitution of Channel 228B for Channel 228A at Christiansted, Virgin Islands, since it could provide Christiansted with an additional wide area service. Channel 228B can be allotted to Christiansted in compliance with the Commission's minimum separation requirements.[1] As requested, we also propose to modify the WAVI construction permit to specify operation on Channel 228B. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 228B at Christiansted or require St. Croix to demonstrate the availability of an additional class channel for use by such parties.[2]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Christiansted, Virgin Islands	228A, 236B, 258B, 262B, 291B	228B, 236B, 258B, 262B, 291B

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 2, 1991,** and reply comments on or before **December 17, 1991,** and are advised to read the Appendix for proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

St. Croix Wireless Co., Inc.
John T. Galanses, President
90 Key Haven Road
Key West, Florida 33040

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

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[1] The reference coordinates for the Channel 228B allotment at Christiansted, Virgin Islands, are 17-44-07 and 64-40-12. This site is 4.0 kilometers (2.5 miles) east of Christiansted.

[2] Sugarbird Communications ("Sugarbird"), former applicant for the Channel 232A allotment at Christiansted, filed an "Expression of Interest in Frequency and Comments in Partial Opposition to Petition for Rulemaking." Sugarbird expresses an interest in applying for a Channel 228B allotment at Christiansted and notes that a Channel 228B for Channel 232A substitution does not involve a mutually exclusive higher class channel as required by Section 1.420(g)(3) of the Rules. As stated above, we have, in a separate proceeding, modified the Station WAVI construction permit to specify operation on Channel 228A. As such, a Channel 228B proposal is now a mutually exclusive upgrade and we will go forward with this proceeding without entertaining competing expressions of interest in the Channel 228B allotment. In a separate vein, Sugarbird notes that it dismissed its application for Channel 232A pursuant to a universal settlement agreement under which St. Croix would pay the dismissing applicants. Inasmuch as St. Croix has not paid Sugarbird, Sugarbird contends that this is a "serious character defect" and that we should not go forward with this upgrade proceeding. In regard to this argument, we do not believe that it would be conducive to the efficient conduct of Commission business to adjudicate in this proceeding any issue relating to a separate earlier settlement agreement. In view of the foregoing, this pleading will not be further considered in this proceeding.

8. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-548

In the Matter of

Amendment of Section 73.202(b), RM-7017
Table of Allotments,
FM Broadcast Stations.
(Clintonville, New Holstein,
and Wautoma, Wisconsin)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: September 27, 1991; Released: October 9, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the Petition for Reconsideration[1] filed by Sail Communications Corporation ("petitioner") of the *Report and Order*, 5 FCC Rcd 7573 (1990), which dismissed its petition to substitute Channel 222C3 for Channel 221A at Clintonville, Wisconsin, and modify the license for Station WJMQ(FM) accordingly. To accommodate the upgrade at Clintonville, petitioner requested the substitution of Channel 225A for Channel 226A at New Holstein, Wisconsin, the modification of the construction permit for Station KFKQ(FM), and the substitution of Channel 226A for vacant but applied for Channel 222A at Wautoma, Wisconsin. In accordance with Commission policy, the petition was dismissed because petitioner failed to state its willingness to reimburse Station KFKQ(FM) for its reasonable expenses involved in changing channels.

2. Petitioner indicates in the Petition for Reconsideration that through inadvertence and lack of legal counsel, it failed to indicate its willingness to reimburse any affected permittee or licensee for reasonable costs involved in changing frequency. Petitioner notes that because of this oversight and for no other reason, its proposal was dismissed. Petitioner now states its willingness to reimburse Station KFKQ(FM), New Holstein, for the reasonable costs involved in changing its frequency, thereby removing the sole reason for dismissal of its petition.[2]

3. DN Communications, Inc. ("DN"), licensee of Station WOSX(FM), Channel 221A, Spencer, Wisconsin, opposes the petition for reconsideration unless petitioner agrees to restrict the site for Station WJMQ(FM), Channel 222C3, Clintonville, to a site which will allow it to operate WOSX(FM) as a six kilowatt station.[3] According to DN, Station WJMQ(FM) can be site restricted and still provide the required city grade coverage to Clintonville, while allowing Station WOSX(FM) to operate as a six kilowatt facility at Spencer.

4. Petitioner filed supplemental comments stating its willingness to use a site for Channel 222C3 that will not interfere with the operation of Station WOSX(FM), Spencer, as a six kilowatt facility. Petitioner provided an engineering study for Channel 222C3 at a fully spaced site and indicates that it will place a city grade signal over the community of Clintonville. Petitioner further indicates that it has every intention of cooperating with DN in its effort to upgrade Station WOSX(FM) to six kilowatts.

5. We believe that the public interest would be served by granting this Petition for Reconsideration, thereby substituting Channel 222C3 for Channel 221A at Clintonville, Wisconsin, since it will provide the community with its first wide coverage FM service. We expect petitioners to timely submit necessary information in the course of a rule making proceeding. An absence of legal counsel does not excuse failure to meet deadlines. However, inasmuch as the channel would have been allotted earlier had it not been for petitioner's failure to acknowledge its reimbursement responsibility, and since this proceeding is uncontested, we believe that a reversal of our earlier decision, rather than initiation of a new proceeding, is warranted. Had this been a contested proceeding, however, we would not have granted the petition for reconsideration.

6. Petitioner has requested the Clintonville channel substitution at a site different than that originally requested. We see no reason not to allot Channel 223C3 to Clintonville at this modified site.[4] To accommodate the Clintonville upgrade, we shall also substitute Channel 225A for Channel 226A at New Holstein, Wisconsin, and substitute Channel 226A for Channel 222A at Wautoma, Wisconsin. The substitutions at New Holstein and Wautoma can be made in compliance with the Commission's spacing requirements.[5] We have authorized a modification of petitioner's license for Station WJMQ(FM), Clintonville, to specify operation on Channel 222C3 in accordance with Section 1.420(g) of the Commission's

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[1] Public Notice was given on January 15, 1991, Report No. 1834.

[2] The permittee of Station KFKQ(FM), New Holstein, did not respond to the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 8642 (1989), directing it to demonstrate why its permit should not be modified to specify operation on Channel 225A in lieu of Channel 226A. Therefore, Station KFKQ(FM) is deemed to have consented to the substitution.

[3] In MM Docket 89-137, 6 FCC Rcd 4848 (1991), effective September 30, 1991, Station WOSX(FM), Spencer, Wisconsin, was modified to specify operation on Channel 222A in lieu of Channel 221A. In footnote 4 of that *Order* it was stated that since the proposal that resulted in the allotment was filed prior to October 2, 1989, the licensee of Station WOSX(FM) may avail itself of Section 73.213(c) of the Commission's Rules with respect to the proposed allotment of Channel 222C3 at Clintonville, Wisconsin.

[4] The coordinates for Channel 223C3 at Clintonville are 44-43-07 and 88-34-32.

[5] The coordinates for Channel 225A, New Holstein, are 44-02-18 and 88-09-06. Since the petition resulting in the allotment at New Holstein was filed prior to October 2, 1989, the permittee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules with respect to Station WAUN(FM), Channel 224A, Kewaunee, Wisconsin, and Station WKJF(FM), Channel 225C, Cadillac, Michigan. The coordinates for Channel 226A, Wautoma, are 44-04-18 and 89-17-30.

Rules. We have also authorized the modification of the construction permit for Station KFKQ(FM), New Holstein, to specify operation on Channel 225A in lieu of Channel 226A, in compliance with the Commission's Rules. The applicant for Channel 222A at Wautoma will be permitted to amend its application to specify the new Class A channel and retain cut off protection (BPH-880421NZ). We will serve the applicant with a copy of this *Order*.

7. Petitioner has stated its willingness to reimburse the permittee for Station KFKQ(FM), New Holstein, for the reasonable costs involved in changing its frequency from Channel 226A to Channel 225A. *See Circleville, Ohio*, 8 FCC 2d 159 (1967).

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below:

Community	Channel No.
Clintonville, Wisconsin	222C3
New Holstein, Wisconsin	225A
Wautoma, Wisconsin	226A

9. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Sail Communications Corporation IS GRANTED.

10. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WJMQ(FM), Clintonville, Wisconsin, IS MODIFIED to specify operation on Channel 222C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the Construction Permit of F.W.K. Broadcasting Co. for Station KFKQ(FM), New Holstein, Wisconsin, IS MODIFIED, to specify operation on Channel 225A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Permit BMPH-881114MP except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with Permit BMPH-881114MP, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

12. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Wautoma Radio Company
981 Howard Street
Green Bay, Wisconsin 54303
(Applicant for Channel 226A, Wautoma)

Frederick W. Kinlow/
F. W. K. Broadcasting Co.
W-238, S-6825 Hwy F
Waukesha, Wisconsin 53186

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-530

In the Matter of

Amendment of Section 73.202(b), RM-7472
Table of Allotments,
FM Broadcast Stations.
(Baker, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 27, 1991; Released: October 9, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 6597 (1990), issued in response to a petition filed on behalf of Althea Bauers ("petitioner") proposing the allotment of Channel 261B to Baker, California, as that community's second local FM service. Petitioner filed supporting comments in response to the *Notice*. Courtney Flatau ("Flatau") filed comments and a counterproposal requesting the allotment of a Class B1 channel to Baker instead of Channel 261B.[1] KRXV, Inc. ("KRXV"), licensee of Station KXVR(FM), Channel 258B, Mountain Pass, California, filed opposing comments to which petitioner responded. No other comments were received.

2. KRXV claims there is no site available to accommodate the Class B proposal at Baker which meets the Commission's minimum distance separation requirements as well as the requirements for the provision of city-grade and line-of-sight coverage. In this regard, KRXV asserts that from the restricted site indicated in the *Notice*, the intervening Soda Mountain Range, which extends the entire length of the non short-spaced area, would preclude compliance with the requirements of Section 73.315(a) and (b) of the Commission's Rules. Therefore, KRXV urges rejection of the proposal, citing *Creswell, Oregon*, 3 FCC Rcd 4608 (1988), *reconsideration denied*, 4 FCC Rcd 7040 (1989), which held that an allotment will not be made in the absence of a reasonable assurance that a suitable site area exists from which a station could operate in conformity with the engineering and technical requirements of the Commission's Rules.[2]

3. In response to KRXV's comments, petitioner has proposed the allotment of Channel 235B1 to Baker instead. Petitioner states that not only does Channel 235B1 meet the minimum distance separation requirements from the community reference coordinates, thereby obviating the technical concerns attached to Channel 261B from the restricted site indicated in the *Notice*, but also nullifies any possible interference to the non-protected contours of grandfathered Station KXVR(FM). Petitioner stated her intention to apply for Channel 235B1 if it is allotted to Baker, as requested.

4. Based on the record before us, we believe the public interest would be served by allotting Channel 235B1, rather than Channel 261B, to Baker as that community's second local FM service. Petitioner has proposed the allotment of the alternate channel, which would obviate the technical concerns raised in this proceeding regarding the Baker allotment. Channel 235B1 can be allotted to Baker without the imposition of a site restriction.[3] Since Baker is located within 320 kilometers (199 miles) of the U.S.-Mexico border, concurrence in the proposal by the Mexican government was obtained.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Baker, California	235B1, 268B

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. The window period for filing applications for Channel 235B1 at Baker, California, will open on **November 26, 1991,** and close on **December 26, 1991**.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] Flatau's comments and counterproposal were not served on the petitioner, in violation of Section 1.420(a) and (c) of the Commission's Rules. *See also* paragraph 4 of the Appendix to the *Notice*. Therefore, Flatau's comments have not been accepted for consideration.

[2] KRXV also objects to the proposed allotment of Channel 261B on the grounds that operation of a station on that channel would cause interference to the signal quality of its Station KXVR(FM). We note that the resolution of this proceeding removes any theoretical conflict between Station KXVR(FM) and the Baker allotment. Therefore, we need not address the merits of KRXV's contentions.

[3] Coordinates used for Channel 235B1 at Baker are 35-15-54 and 116-04-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-491

In the Matter of

Amendment of Section 73.202(b),	RM-6371
Table of Allotments,	RM-6650
FM Broadcast Stations.	
(Vacaville and *Middletown*,[1]	
California)	

SECOND REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1991; Released: October 9, 1991

By the Chief, Allocations Branch:

1. The Commission has before it a *Further Notice of Proposed Rule Making*, 4 FCC Rcd 8417 (1989) ("*Further Notice*"), in this proceeding, which proposed that Channel 254A be allotted to Middletown, California, as its first local service. Comments and a supplement to them were filed by Joe L. and L. Ann Gross ("the Grosses"). A reply was filed by Quick Broadcasting, Inc. ("Quick"), licensee of Station KUIC(FM), Vacaville, California.

BACKGROUND

2. At the request of Quick, the *Notice of Proposed Rule Making*, 3 FCC Rcd 6128 (1988), in this proceeding originally proposed to substitute Channel 237B1 for Channel 237A at Vacaville, California, and to modify Quick's license to specify operation on the upgraded channel. In response to the *Notice*, the Grosses filed a timely counterproposal requesting the allotment of Channel 238A to Middletown, California.[2] Thereafter, in a *First Report and Order*, 4 FCC Rcd 8315 (1989), we indicated that Channel 254A was available as an alternative channel to Middletown and that this would eliminate the conflict between the mutually exclusive proposals of Quick and the Grosses. However, we also stated that there was not a sufficient basis in the record to determine Middletown's status as a community for allotment purposes. As a result, we issued a *Further Notice* soliciting additional information to resolve the community issue. In addition, since the proposals were no longer in conflict, the *First Report and Order* substituted Channel 237B1 for Channel 237A at Vacaville and modified Quick's license to specify operation on the higher powered channel.[3]

THE PLEADINGS

3. In their comments, the Grosses attach a draft of the "Middletown Area Plan," in which the government of Lake County, of which Middletown is the major part, projects the growth and development of Middletown and surrounding communities. That plan, say the Grosses, characterizes Middletown as a community distinct from the area surrounding Middletown. They argue that the Area Plan's recognition of Middletown's having a downtown is indicative of the community's "distinctness and cohesiveness." The Grosses note that while the 1980 Census did not identify Middletown, the Area Plan lists a separate 1980 population for Middletown and identified its boundaries. It is noted that the Commission has considered that governmental recognition of a defined community is probative of community status, citing *Mighty-Mac Broadcasting Co.*, 58 RR 2d 599, 603 (Rev. Bd. 1985). Further indicia of Middletown's community status, point out the Grosses, are Middletown's post office, its own school district and newspaper, the totality of circumstances, among which are its "identity and history... over a century," and the distinct plans that are being made for its "growth and expansion." The Grosses later submit in a supplement to their comments the number of and wide range of businesses in Middletown, the large number of community service activities there, the location of the main station for fire protection for the district in which Middletown lies, including fire protection of forests in the Middletown area, and the placement of a Lake County sheriff's office in that community. The Grosses claim that all these indicia support its contention that Middletown is a community for allotment purposes, as does the claimed fact that governmental entities treat Middletown as a community.[4]

4. In reply, Quick contends that a Class A facility at a site located in the center of the community "cannot cover the entire Middletown area with a 70 dBu signal." Quick's engineer superimposes on a copy of a map of the Middletown area provided by the Grosses in their comments the ideal coverage of maximum facility Class A stations. The drawing purportedly shows that the 70 dBu contour for a three kilowatt Class A station (with a 13.7 km radius) and that for a six kilowatt Class A station (16.1 km radius) do not provide the 100% principal city coverage that Section 73.315(a) requires. Quick notes that use of any other hypothetical site in any cardinal direction away from the central site reduces principal city coverage even further. Quick does not comment on the status of Middletown as a community for allotment purposes.

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[1] Middletown has been added to the caption.

[2] Public Notice of the counterproposal was given January 23, 1989, Report No. 1766.

[3] A petition for reconsideration of the *First Report and Order* was filed by the Grosses, questioning whether Quick would be able to provide city grade coverage to all of Vacaville on the upgraded channel. This petition was denied in a *Memorandum Opinion and Order*, 6 FCC Rcd 143 (1991).

[4] The Radio Engineering Company, whose principal, Norwood J. Patterson, served as the Grosses' consultant and prepared their engineering showings regarding the Vacaville upgrade, filed comments more than 1 year late on behalf of a prospective applicant for Channel 254A in Middletown. No public interest justification is given why we should accept these late-filed comments, and they are dismissed as untimely.

DISCUSSION

5. After careful consideration of the information that the Grosses have submitted, we are convinced that Middletown, California, is a community for allotment purposes. The Commission's policy is that, if a community is not incorporated or listed in the U.S. Census, as with Middletown, the proponent of an allotment to that community must show that it has a geographically identifiable population grouping. *See Mighty-Mac, supra,* and *North Naples, Florida,* 41 RR 2d 1549, 1551 (1977). The proponent need not show that the borders of the locality are precisely ascertainable. What must be shown, however, is that the residents of the locality are commonly regarded as a distinct group. This can be proven by the "testimony of local residents or by objective indications of the existence of a common perception that a locality's populace constitutes a distinct 'geographical grouping.'"[5] Examples of objective indications of community status include the existence of political, commercial, social and religious organizations and services in the community. Another indication of community status is "whether the residents function as and conceive of themselves as residents of a community, around which their interests coalesce." *See Mighty-Mac, supra.*

6. The record indicates that the objective indicia of community status are present in Middletown. Chief among them is the recognition by a unit of the governing political entity, Lake County, that Middletown is a community which is separate from but central to a named planning area. In the County's Middletown Area Plan, several maps are provided that clearly portray Middletown as a separate community with identifiable boundaries. In addition, the Grosses have provided a wealth of indicia that demonstrate the existence of a wide range of political, commercial, public safety, and other institutions characteristic of distinct community status. Therefore, any questions we previously had as to Middletown's status as a community for allotment purposes have been resolved.

7. We believe that the public interest would be served by allotting Channel 254A to Middletown because this would provide a first local aural service to that community. Channel 254A can be allotted to Middletown in compliance with the minimum distance separation requirements without the imposition of a site restriction.[6] We also conclude that a station operating on Channel 254A at Middletown could comfortably provide that community with principal city coverage.[7]

8. Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED That effective **November 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Middletown, California	254A

9. The window period for filing applications for Channel 254A at Middletown, California, will open on **November 26, 1991,** and close on **December 26, 1991**.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning the above, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 634-6530. Questions relating to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[5] *Beacon Broadcasting,* 2 FCC Rcd 3469, 3471-72 (1987), *recon denied,* 2 FCC Rcd 7562 (1987) [emphasis in original].

[6] Coordinates for Channel 254A at Middletown are 38-45-12 and 122-36-54. Because the petition that resulted in this allotment was filed prior to October 2, 1989, the applicants for this allotment may avail themselves of the provisions of Section 73.213(c)(1) with respect to Station KDBK(FM), Channel 255B, San Francisco, California.

[7] We reject Quick's allegation that the Grosses' proposal could not provide 70 dBu coverage to all of Middletown. That allegation is erroneously based on use of a map of the Middletown Planning Area, not the community of Middletown. The community encompasses a significantly smaller area than the Planning Area. The "Middletown Area Plan" that Quick submits includes several maps that show demonstrably that Middletown is centrally located in the Planning Area and is at most half as large as the Planning Area. There is a considerable area within the community where a site could be located from which the requisite coverage of Middletown could be provided, even with a 3kW facility.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-149

In the Matter of

Amendment of Section 73.202(b), RM-7716
Table of Allotments,
FM Broadcast Stations.
(Needles, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1991; Released: October 9, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 6 FCC Rcd 3294 (1991), issued in response to a petition filed on behalf of Calnevar Broadcasting, Inc. ("petitioner"), proposing the substitution of Channel 250C1 for Channel 250C2 at Needles, California, and modification of the license for Station KWAZ(FM) accordingly. Petitioner and Green River Broadcasting Corp. ("Green River"), the proposed transferee of Station KWAZ(FM), filed joint supporting comments,[1] stating an intention to apply for Channel 250C1, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 250C1 for Channel 250C2 at Needles since it could provide an enhanced service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will substitute Channel 250C1 for Channel 250C2 and modify the license of Calnevar Broadcasting, Inc., as requested. As indicated in the *Notice*, Channel 250C1 can be allotted to Needles consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules at the petitioner's specified site.[2] Additionally, as Needles is located within 320 kilometers (199 miles) of the Mexico border, concurrence of the Mexican government to this proposal was obtained.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, ITS ORDERED, That effective **November 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Needles, California	250C1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Calnevar Broadcasting, Inc. for Station KWAZ(FM), IS MODIFIED to specify operation on Channel 250C1 in lieu of Channel 250C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Calnevar Broadcasting, Inc., licensee of Station KWAZ(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] On September 3, 1991, the Commission granted an application (BTCH-910705EC) to transfer control of the license of Station KWAZ(FM) to Green River.

[2] Coordinates for Channel 250C1 at Needles are 35-02-06 and 114-22-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CICI, Inc. File No. I-T-C-91-163

For Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Acquire on an Ownership Basis, and Operate, Capacity in the TPC-4 Cable System, for the Provision of Its Authorized Services between the United States Mainland and Japan, and beyond.

CICI, Inc. File No. SCL-91-005 ML

Application for Amended License to Land and Operate a High Capacity Digital Submarine Cable System Extending from the United States Mainland to Canada and Japan (TPC-4)

ORDER AND AUTHORIZATION

Adopted: September 30, 1991; Released: October 8, 1991

By the Chief, International Facilities Division:

1. On July 5, 1991, CICI, Inc. (CICI) filed an application requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214, to acquire on an ownership basis, and to operate, capacity in the TPC-4 Cable System for the provision of its authorized services between the United States Mainland and Japan, and beyond. Concurrently with its Section 214 application, CICI filed an application to amend the TPC-4 submarine cable landing license held by the United States international service carriers (USISC's)[1] to have itself added as a licensee (File No. SCL-91-005 ML). The applications were placed on notice July 17, 1991. No comments were received.

2. CICI is a corporation, d/b/a IDB International, organized and existing under the laws of the State of Delaware, is engaged in the business of furnishing international telecommunications services and is a "dominant carrier". In these instant applications, CICI seeks authority to acquire a half-interest in three Minimum Investment Units (MIUs)[2], which is the equivalent of 90 Minimum Assignable Units of Ownership (MAUOs), in the TPC-4 on an ownership basis, and operate jointly with Kokusai Denshin Denwa Co., Ltd. (KDD), as follows:

(1) Subsegment B1 90 MAUOs (3 MIUs)

(2) Subsegment B2 90 MAUOs (3 MIUs)

(3) Subsegment B3 0 MAUOs (0 MIUs)

Thus, CICI will have a voting interest of 0.25887%, with an ownership interest of 0.33482% in Subsegment B1 and 0.29762% in Subsegment B2. CICI adds that it will have no interest in either Subsegment B3 or Segment D. CICI estimates its capital requirement for the acquisition of cable capacity in TPC-4 to be $1.1 million, payable over three years. CICI submits that this application will serve the public interest, convenience and necessity.

3. In addition, CICI seeks authority to acquire by lease, or otherwise, such connecting facilities as may be required to extend capacity in the TPC-4 Cable System to points located beyond the TPC-4 landing points. CICI notes that it has not yet finalized its plans for interconnection at the cable landing stations and may lease capacity from AT&T. Furthermore, CICI seeks to modify the existing cable landing license by adding itself as a licensee of the cable system.

4. In the matter before us, the Department of State, in coordination with the National Telecommunications Information Administration and the Defense Information Systems Agency, has advised the Commission that it has no objections to the issuance of an amended TPC-4 cable landing license, subject to any Department of Treasury licensing which may be required. [3]

5. After consideration of CICI's request to supplement its existing facilities in the provision of its authorized services, we find that the grant of the application will serve the public interest. The requested TPC-4 capacity will be used in conjunction with CICI's satellite capacity in order to increase the number of its communication circuits between the United States and Japan, and beyond, and to increase route diversity. The Commission has previously recognized that increasing route diversity will strengthen service reliability. The addition of a new route via TPC-4 will also enhance restoration alternatives.[4]

6. Accordingly, IT IS ORDERED that the applications of CICI, File Nos. I-T-C-91-163 and SCL-91-005-ML ARE GRANTED and:

a. CICI is authorized to acquire and operate half interests in three MIUs to be owned and operated jointly with KDD in Subsegments B1 and B2; and

b. The TPC-4 cable landing license is amended to include CICI as an owner and a licensee under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United States", 47 U.S.C. Sections 34-39 and Executive Order 10530, dated May 10, 1954, 3 C.F.R. 1954-58 (Comp., p. 189 (1961)) *reprinted in* 3 U.S.C.A. Section 301 at 1052 (1985).

7. IT IS FURTHER ORDERED that CICI shall comply with any Department of Treasury licensing which may be required.

8. IT IS FURTHER ORDERED that CICI is authorized to acquire by lease such connecting facilities as may be required to extend its capacity in TPC-4 to Japan and beyond.

9. IT IS FURTHER ORDERED that AT&T shall file with the Commission all necessary amendments and adjustments to the C&MA as required by the authorization herein to CICI.

10. IT IS FURTHER ORDERED that AT&T is authorized to conform the assignment of capacity in the TPC-4 cable system as summarized herein.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under 1.115 of the Commission's Rules may be filed within 30 days of the date of the public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In a decision adopted on October 26, 1989, the Commission found that the construction and operation of the high capacity digital optical fiber TPC-4 Cable System would serve the public interest. 4 FCC Rcd. 8042, 8050 (1989). The cable system will extend between landing points at the cable stations at Point Arena, California and Port Alberni, British Columbia, Canada on the east and Chikura, Japan on the west. The U.S. owners of TPC-4 are American Telephone & Telegraph, Fedex International Transmissions Corp., FTC Communications, Inc., MCI International, Inc., Overseas Telecommunications, Inc., TRT Telecommunications Corp., U.S. Sprint Communications Company Limited Partnership, and World Communications, Inc. The TPC-4 Construction and Maintenance Agreement (C&MA) provides for additional acquisition of capacity on an Indefeasible Right of User (IRU), lease or other mutually agreed upon basis, subject to Commission authority. The C&MA permits new carriers to obtain TPC-4 capacity on an ownership basis up to the Ready for Service date, October 1992.

[2] One MIU is equivalent to a 2.048 Mbps bit stream (30 MAOUs).

[3] Letter from Randolph C. Earnest, Director for Satellite and Cable Policy, Department of State, to George S. Li, Chief, International Facilities Division, Federal Communications Commission, dated August 27, 1991.

[4] *See* TPC-4, 4 FCC Rcd. 8042, 8047 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-297

In the Matter of

Amendment of Section 73.606(b), RM-7709
Table of Allotments,
TV Broadcast Stations.
(Snyder, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 30, 1991; Released: October 10, 1991

Comment Date: December 2, 1991
Reply Comment Date: December 17, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Ramar Communications, Inc. ("petitioner") requesting the reallocation of vacant UHF Channel 22 from Wolfforth, Texas, to Snyder, Texas, as the community's first local television service. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner states that Snyder is an incorporated community and serves as the county seat of Scurry County.[1] Petitioner notes Snyder has an elected government and presently has no local television service. Wolfforth, on the other hand, receives city grade signals from five Lubbock, Texas, television stations while Snyder receives only one grade B signal. Petitioner asserts that Snyder has six times the population of Wolfforth and is an independent community that helps supports the entire county. Conversely, it describes Wolfforth as a small community which serves largely as a suburb of Lubbock, Texas. Further, petitioner notes that should there ever be an expression of interest to provide additional television service to Wolfforth, UHF Channel 16, currently allotted to Lubbock, Texas, is a vacant commercial allotment which could be reallotted to Wolfforth.

3. We believe the public interest would be served by proposing the allotment of a television Channel to Snyder, since the allotment would provide the community with its first local TV service. Although petitioner proposed the reallotment of Channel 22 from Wolfforth to Snyder, an engineering analysis indicates the availability of UHF Channel 17 for use at Snyder, thereby eliminating the need for a comparative analysis between the two communities. Channel 17 can be allotted to Snyder with a minus offset[2] consistent with the minimum distance separation requirements of Sections 73.610 and 73.698 of the Commission's Rules without the imposition of a site restriction.[3] Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the proposed allotment at Snyder is not affected.[4]

4. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Snyder, Texas	--	17-

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 2, 1991,** and reply comments on or before **December 17, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard R. Zaragoza, Esq.
Scott R. Flick, Esq.
Lauren Ann Lynch, Esq.
Fisher, Wayland, Cooper
and Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the Television Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule*

[1] According to the U.S. Census, Snyder has a population of 12,705 persons and is located in Scurry County which has a population of 18,192 persons. Snyder is located approximately 120 kilometers (75 miles) southeast of Lubbock, Texas.

[2] "A station with a 'plus' or 'minus' offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television stations reduces interference and makes possible the separation criteria set forth in our Rules." *Crandon, Wisconsin,* 3 FCC Rcd 6765 n. 1 (1988).

[3] Coordinates for UHF Channel 17 at Snyder are North Latitude 32-43-36 and West Longitude 100-54-42.

[4] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service,* 52 Fed. Reg. 28346, published July 29, 1987.

Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-418

In the Matter of

Amendment of Section 73.202(b),	RM-6879
Table of Allotments,	RM-7252
FM Broadcast Stations.	
(Milan, Metter, Swainsboro)	
and Wrens, Georgia)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1991; Released: October 10, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it a *Notice of Proposed Rule Making*, 4 FCC Rcd 7037 (1989), issued in response to a petition for rule making filed by Val-Tel, Inc. ("Val-Tel"), proposing the substitution of Channel 245C3 for Channel 244A at Wrens, Georgia, and modification of its license for Station WRDW(FM) to specify operation on the higher powered channel (RM-6879). Tel-Dodge Broadcasting Company, Inc. ("Tel-Dodge"), licensee of Station WMCG(FM), Milan, Georgia, filed a petition for rule making requesting the substitution of Channel 285C2 for Channel 285A at Milan, Georgia, and modification of its license to specify operation on Channel 285C2. In order to accommodate the upgrade at Milan, Tel-Dodge also proposes the substitution of Channel 279A for Channel 285A at Metter, Georgia, the substitution of Channel 245A for Channel 280A at Swainsboro, Georgia, and the modifications of the authorizations of Stations WHCG(FM), Metter, and WXRS(FM), Swainsboro, accordingly (RM-7252). The proposed substitution of Channel 245C3 at Wrens and the substitution of Channel 245A at Swainsboro are mutually exclusive. Therefore, we have treated Tel-Dodge's petition as a counterproposal in this proceeding.[1]

2. Val-Tel and Tel-Dodge filed reply comments in response to the counterproposal stating, *inter alia*, that the conflict between their proposals can be resolved if Channel 263A can be substituted for Channel 280A at Swainsboro, Georgia, at its present transmitter site. Tel-Dodge states its willingness to reimburse the licenses of Station WHCG(FM), Metter, Georgia, and Station WXRS(FM), Swainsboro, Georgia, for the reasonable expenses they incur in changing their operating frequencies on the new channels proposed. In addition, Val-Tel notes, Station WXRS(FM) would also be able to operate with 6 kW at this channel with a slight change in site.[2]

3. We issued *Orders to Show Cause*, 5 FCC Rcd 7435 (1990) ("*Order*"), ordering Wm. Jimmy Page, TR/As Radio Metter ("Radio Metter"), to show cause why its license should not be modified to specify operation on Channel 279A in lieu of Channel 285A, and ordering Lacom Communication, Inc., to show cause why its license should not be modified to specify operation on Channel 263A in lieu of Channel 280A. In response to the *Order*, Crossroads Road, Inc. ("Crossroads"), successor-in-interest to Lacom Communications Inc., filed comments. Radio Metter filed no response to the *Order*. Accordingly, pursuant to Section 1.87 of the Commission's Rules, Radio Metter is deemed to have consented to the proposed modification. After the record closed, Tel-Dodge filed a reply to Crossroads' comments, and Crossroads filed a motion to strike.[3]

4. Crossroads in its comments states that there is no technical impedient to the operation of Station WXRS(FM) on Channel 263A. However, Crossroads alleges that Station WXRS(FM) will suffer serious economic harm by the channel change. Crossroads notes that its promotional campaign is based entirely on its dial position, and a change in frequency would require a change in virtually everything associated with the station promotion. Crossroads argues that even though Tel-Dodge states its willingness to reimburse the licensee of Station WXRS for the reasonable expenses, Tel-Dodge's commitment "is not firm." Crossroads states that it calculated its expenses associated with the channel change, submitted the estimate to Tel-Dodge with a proposed agreement with respect to the payment of those expenses, and Tel-Dodge refused to sign the agreement. Crossroads maintains that these expenses fall into the categories of reimbursable items established in *Circleville, Ohio*, 8 FCC 2d 159 (1967) ("*Circleville*"). Crossroads states that unless there is an agreement with Tel-Dodge to assume expenses, it strenuously opposes the proposed channel change. In addition, Crossroads requests that this proceeding be held in abeyance pending an agreement between the parties, or that any final order be conditioned upon the payment of its estimated expenses.

5. In reply comments Tel-Dodge restates its intention to reimburse Crossroads for expenses involved in the change of channels. Tel-Dodge states that it will negotiate with Crossroads in good faith to determine the amount of reasonable reimbursement to which Crossroads is entitled, if the Commission allots Channel 285C2 to Milan, in accordance with guidelines set forth in *Circleville*, and that its refusal to begin negotiations with Crossroads at this time is legitimate. Tel-Dodge also suggests that since Val-Tel will benefit from the resolution of this proceeding, Val-Tel should also be required to share in the reimbursement, citing *Circleville*. However, Tel-Dodge notes that it will solely reimburse Crossroads, if necessary.[4]

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[1] Public Notice of the counterproposal was given on February 6, 1990, Report No. 1807.

[2] Val-Tel and Tel-Dodge's reply comments have been fully summarized in the *Orders to Show Cause*, 5 FCC Rcd 7345 (1990).

[3] Although the Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period, we will accept these comments in the interest of compiling a full record in this proceeding. Accordingly, Crossroad's motion is denied.

[4] Tel-Dodge is the primary beneficiary of the channel change at Station WXRS(FM), Swainsboro. Furthermore, Tel-Dodge

6. We have reviewed all pleadings filed in this proceeding and we do not believe the public interest would be served by holding this proceeding in abeyance. Tel-Dodge has stated that it will reimburse the licensees of Station WHCG(FM), Metter, and Station WXRS(FM), Swainsboro, for the reasonable expenses incurred in changing their operating frequencies on the new channels. Reimbursement of costs incurred by the affected stations, both technical and promotional, is governed by the guidelines set forth in *Circleville* and is left to the good faith negotiation of the parties involved. Parties are expected to expeditiously reach a reasonable and equitable agreement. It is not the Commission's policy to mediate, at the outset, claims to establish the amount of reimbursement. The Commission will do so only as a last resort. *See, e.g., Harold A. Jahnke,* 46 RR 2d 659 (1979), *Mayville and Wickliffe, Kentucky,* 48 RR 2d 1232 (1981).[5]

7. We believe the public interest would be served by the substitution of Channel 245C3 for Channel 244A at Wrens, Georgia, and modification of the license for Station WRDW(FM) to specify operation on the higher powered channel, as well as the substitution of Channel 285C2 for Channel 285A at Milan, Georgia, and modification of the license for Station WMCG(FM) to specify operation on Channel 285C2. These substitutions will provide each community with an expanded area FM service. To accommodate the substitutions, Channel 279A will be substituted for Channel 285A at Metter, Georgia, and Channel 263A will be substituted for Channel 280A at Swainsboro, Georgia. Channel 245C3 can be allotted to Wrens in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.9 kilometers (5.6 miles) east,[6] Channel 285C2 can be allotted to Milan in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.2 kilometers (11.9 miles) northwest, in order to avoid short-spacing to Channel 286C2, Blackshear, Georgia. Channel 279A can be allotted Metter, Georgia, and Channel 263A can be allotted to Swainsboro, Georgia,[7] at its present transmitter site. As proposed, we shall modify the licenses for Station WRDW(FM), Wrens, Georgia, to specify Channel 245C3, Station WMCG(FM), Milan, Georgia, to specify Channel 285C2, Station WHCG(FM), Metter, Georgia, to specify Channel 279A, Station WXRS(FM), Swainsboro, Georgia, to specify Channel 263A.

8. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Milan, Georgia	285C2
Metter, Georgia	279A
Swainsboro, Georgia	251A, 263A
Wrens, Georgia	245C3

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WMCG(FM), Milan, Georgia, IS MODIFIED, to specify operation on Channel 285C2 in lieu of Channel 285A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WRDW(FM), Wrens, Georgia, IS MODIFIED, to specify operation on Channel 245C3 in lieu of Channel 244A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

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has untimely raised the issue of shared reimbursement. It should have done so in earlier comments so as to enable Val-Tel to respond. Therefore, only Tel-Dodge will be required to reimburse Crossroads.

[5] In any event, Crossroads need not change channels immediately. As the Commission has stated," it is generally not necessary for the change to take place until utilization of the existing frequency actually prevents a newly authorized station from inaugurating service." *See Broken Arrow and Bixby, Oklahoma, and Coffeyville, Kansas,* 4 FCC Rcd 6981 (1989), and *Churchville and Luray, Virginia,* 5 FCC Rcd 1106 (1990).

[6] The coordinates for Channel 245C3 at Wrens are North Latitude 33-13-20 and West Longitude 82-17-50. Because this petition was filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules with respect to Station WFOX(FM), Channel 246C at Gainesville, Georgia, at coordinates 34-07-32 and 83-51-31. *See* 47 CFR § 73.213(c).

[7] The coordinates for Channel 285C2 at Milan are North Latitude 32-09-32 and West Longitude 83-10-55. The coordinates for Channel 279A at Metter are North Latitude 32-23-56 and West Longitude 82-02-16. The coordinates for Channel 263A at Swainsboro are North Latitude 32-34-52 and West Longitude 82-23-14. Because this petition was filed prior to October 2, 1989, the licensee of Station WHCG may avail itself of the provisions of Section 73.213(c)(l) of the Commissions Rules with respect to Channel 280A, Springfield, Georgia, at coordinates 32-22-02 and 81-18-18, the licensee of Station WXRS may avail itself of the provisions Section 73.213(c)(1) of the Commission's Rules with respect to Channel 264C3 at Milledgeville, Georgia, at coordinates 33-05-24 and 83-06-04.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WHCG(FM), Metter, Georgia, IS MODIFIED, to specify operation on Channel 279A in lieu of Channel 285A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WHCG(FM)'s license BLH-7748 except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provision of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-7748 except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

12. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WXRS(FM), Swainsboro, Georgia, IS MODIFIED, to specify operation on Channel 263A in lieu of Channel 280A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WXRS(FM)'s license BLH-820816AT except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provision of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-820816AT except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-566

In the Matter of

Amendment of Section 73.202(b),	RM-7013
Table of Allotments,	RM-7096
FM Broadcast Stations.	
(Bostwick and Good Hope, Georgia)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1991; Released: October 10, 1991

By the Assistant Chief, Allocations Branch:

1. Pursuant to the request of Community Broadcasting Company, Inc. ("Community"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8534 (1989), proposing the allotment of Channel 222A to Good Hope, Georgia, as that community's first local broadcast service. Community filed comments restating its intention to apply for the channel, if allotted to Good Hope. Ronald A. Reeves ("Reeves") filed a petition for rule making and a counterproposal requesting the allotment of Channel 222A to Bostwick, Georgia, as that community's first local FM service.[2] Reeves filed reply comments.

2. Reeves in his counterproposal states that he resubmits his request as a counterproposal[3] in order to offer his comparative showing that Bostwick should be favored for the allotment of Channel 222A. Reeves asserts that there are no other channels available for allotment to Bostwick or Good Hope to eliminate the conflict. Therefore, Reeves contends that the Commission should compare the relative needs of the two communities for a first local service. Reeves states that Bostwick's population of 370 persons is 48% larger than Good Hope's population of 250.[4] He also argues that where no significant preference can be claimed based on any other factors, the comparison can be based on population alone, citing *Seymour and Pigeon Forge, Tennessee*, 2 FCC Rcd 2016 (1987). Reeves contends that under the allotment priorities adopted in *Revision of Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), both proposals offer a first local transmission service. Therefore, he claims Bostwick should prevail because of its population. He also argues that Bostwick has several businesses, two churches, a post office, a city water system and a volunteer fire department.

3. In his reply comments, Reeves restates his intention to apply for Channel 222A at Bostwick, if allotted. He states that Bostwick's larger population and more remote location support the allotment of Channel 222A to Bostwick, particularly in the absence of any overriding factors favoring Good Hope. Reeves also submits letters from community residents, business owners, and city officials expressing support for a station in Bostwick.

4. We believe that Bostwick and Good Hope are both deserving of a first local FM service. However, Channel 222A is the only channel available to either community. Thus, we shall base our decision on the allotment criteria set forth in *Revision of FM Assignment Policies and Procedures, supra*. These priorities are:

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service; and

(4) Other public interest matters.

[Co-equal weight given to priorities (2) & (3)].

The allotment of Channel 222A to either Bostwick or Good Hope would not provide any first or second aural reception service. Both communities are well served by reception services. A Commission engineering analysis has determined that Bostwick and Good Hope are both served by Atlanta stations WABE(FM), WCNN(AM), WSB(AM) and WGUN(AM); Athens, Georgia, stations WNGC(FM), WALK(FM), and WRFC(AM), and Monroe, Georgia, stations WKUN(AM) and WRED(AM). In addition, Good Hope is served by Atlanta FM stations WPCH, WPDS, WSB and WVEE. The proposals would provide a first local transmission service to each community, thereby fulfilling priority (3). Therefore, our decision must be based on priority (4), other public interest factors. In this regard, we note that the incorporated community of Bostwick (population 370) has a larger population than Good Hope (population 250). The new allotment should be given to Bostwick as the larger of the two communities. *See Three Oaks and Bridgman, Michigan*, 5 FCC Rcd 1004 (1990); *Clarksville and Lane, Indiana*, 4 FCC Rcd 4968 (1989).

5. A staff engineering analysis has determined that Channel 222A can be allotted to Bostwick, Georgia, in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 3.5 kilometers (2.2 miles) west of the community.[5] The site restriction is necessary in order to avoid short-

[1] The community of Bostwick has been added to the caption.

[2] Public Notice of Reeves' counterproposal was given on February 27, 1990, Report No. 1808, RM-7096.

[3] Reeves originally filed a petition for rule making proposing the allotment of Channel 222A to Bostwick before October 2, 1989. Therefore, we will consider his petition pursuant to the minimum distance separation requirements in effect at that time.

[4] Population figures are taken from the 1980 U.S. Census.

[5] The coordinates for Channel 222A at Bostwick are North Latitude 33-45-00 and West Longitude 83-33-00. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Channel 221A, Elberton, Georgia, at coordinates 34-01-45 and 82-55-16, Channel 221A, Jackson, Georgia, at coordinates 33-16-37 and 83-57-59, and Channel 222C, Chattanooga, Tennessee, at coordinates 35-08-06 and 85-19-25.

spacing to Station WWRK(FM), Channel 221A, Elberton, Georgia, and to Station WJGA(FM), Channel 221A, Jackson, Georgia.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Bostwick, Georgia	222A

7. The window period for filing applications will open on **November 26, 1991,** and close on **December 26, 1991**.

8. IT IS FURTHER ORDERED, That the petition for rule making filed by Community Broadcasting Company, Inc., (RM-7013) IS DENIED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-53

In the Matter of

Amendment of Section 73.202(b), RM-6614
Table of Allotments,
FM Broadcast Stations.
(Salem and Sioux Falls, South Dakota)

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 1991; Released: October 10, 1991

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for reconsideration filed by Sioux Falls College ("College") of the *Report and Order*, 5 FCC Rcd 1000 (1990), which substituted Channel 263C1 for Channel 263C2 at Salem, South Dakota, and modified Station KIKN's (formerly KSML) construction permit to specify operation on the higher powered channel by substituting Channel 252A for Channel 261A at Sioux Falls, South Dakota, and by modifying College's license for Station KCFS to specify operation on the alternate Class A channel.[1] An opposition to the petition for reconsideration was filed by Big Sioux Broadcasting, Inc. ("Big Sioux"), permittee of Station KIKN, to which College replied.

2. College contends that it would not oppose a "legitimate" upgrade in the facilities of another station. However, in this case, it argues that Salem is not populous enough to support a Class C1 allotment or to justify the expense involved in constructing such facilities. College notes that Station KIKN has yet to be built, even though authorized to construct with Class C2 facilities and that Class C1 facilities are "enormously" expensive to implement, with only a relatively small difference between Class C2 and C1 facilities. Therefore, it contends that Big Sioux's real intention in seeking the upgrade to Class C1 is to accomplish a *de facto* change in Station KIKN's community of license to the larger community of Sioux Falls. In support of its *de facto* reallotment charge, College states that Station KIKN, as a Class C2, would put a "decent" signal into Sioux Falls but that Station KCFS' continued operation on Channel 261A would prevent most Sioux Falls FM radios from receiving Station KIKN's signal. It states that while the Commission's Rules provide for the upgrading of existing stations in order to improve signal coverage, College contends that such a favorable policy does not exist where the purpose of the upgrade is only to "bump" an adjacent channel station in order to eliminate interference. In addition, it again requests that the Commission investigate the financial ability of Station KIKN's permittee to effectuate the construction of the station. Finally, College also reiterates its argument that a second channel change by Station KCFS since August of 1988, when it moved to Channel 261A would create public confusion.

3. Big Sioux contends that College's petition for reconsideration does not present any information or arguments which were not already raised and fully discussed by the Commission in either the *Notice of Proposed Rule Making* or the *Report and Order*. Big Sioux notes that Station KCFS's 1988 move to Channel 261A was made pursuant to the College's own request. It reiterates that the Commission found no basis for determining that the requested upgrade was a *de facto* change of community, that the need to modify Station KCFS's channel from Channel 261A was based on anything more than the need to meet the minimum distance separation requirements for a Channel 263C1 allotment at Salem, or that College had presented any evidence to warrant an investigation of Big Sioux's finances. Further, Big Sioux points out that the Commission found in this instance, as it has consistently found in other similar requests for upgrades, that the public interest is served by the expansion of an existing station's coverage area. Finally, it acknowledges that Station KIKN has not yet been constructed but states that the delay has been occasioned by a desire to avoid wasting financial resources by building a lower powered facility only to have to reconstruct to conform to the higher class within a short period of time.

4. In response, College contends that Big Sioux's request for an extension of its construction permit confirms all of its allegations. It argues that there is no significant cost savings by delaying construction with Class C2 facilities, stating that the permittee need only add additional height to its tower and/or increase transmitter power to achieve Class C1 facilities. College again argues that Big Sioux is simply unwilling to go on the air as a Salem station unless it can provide acceptable service to Sioux Falls. Finally, College notes that a petition for rule making has been filed by Wallace Christensen and Vermillion Radio which, *inter alia*, seeks to move Station KCFS from Channel 252A to Channel 233A. *See* 5 FCC Rcd 6444 (1990). However, College states that no change in Station KCFS's channel would be required if the petition for reconsideration in this proceeding is granted.

5. College's petition for reconsideration consists of a reiteration of the issues which it has already presented in response to Big Sioux's petition and the *Order to Show Cause*, 4 FCC Rcd 2198 (1989), as to why Station KCFS' license should not be modified and which were considered and disposed of in the *Report and Order*. College has not presented any new facts or arguments or shown reversible error. Therefore, its petition for reconsideration will be denied.

6. College may be correct that Station KIKN's signal will cover Sioux Falls as either a Class C1 or C2. However, it has not shown that Big Sioux sought the upgrade merely to eliminate potential interference from Station KCFS or that Station KIKN in reality seeks to become a Sioux Falls station. As detailed in the *Report and Order*, Channel 263C1 cannot be allotted to Salem in compliance with the Commission's minimum distance separation requirements unless Station KCFS operates on a channel other than its present Channel 261A. Nor has College

[1] Public Notice of the filing of the petition for reconsideration was given on April 23, 1990, Report No. 1815.

presented any reason why a Class C1 channel should not be allotted to Salem. The Commission abolished its policy of allotting higher powered channels only to communities of a certain size in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). In so doing, the Commission stated:

> "The theoretical advantage of assigning a Class A channel to a small town and a B/C channel to serve larger ones breaks down in many cases. Some small towns are the population center for a sizeable area. Since a Class A channel would not be able to cover this entire area, a Class B or C channel is needed.... In these cases, the result of the policy is to require additional work for the petitioner and introduce unnecessary delay in reviewing the showings on behalf of an exception to the policy.... Nor has the Commission's own experience since suggested a need to continue a policy that either refuses an assignment which fully meets the rules or makes it only after an extensive showing has been filed. Accordingly, we no longer intend to mandate the choice of a channel based on community size."

90 FCC 2d at 97 (1982).

7. Finally, College has not presented any evidence showing that the assignment of Station KIKN's construction permit or the voluntary delaying of construction pending the outcome of the rule making is extraordinary. We do not see how these actions call into question Big Sioux's financial ability to implement the upgrade and reimburse College for the costs associated with its change in channel. We see no reason, and find that College has failed to present such a reason, to question the business judgement of the original permittee in seeking assignment of the permit to another party or in wanting to delay construction until the conclusion of the rule making to avoid reconstruction costs, however minor. Further, we again do not find that the public interest would be better served by denying the additional reception service which Station KIKN will provide as a Class C1 station in order to avoid any disruption which Station KCFS's channel change may cause to the station's operation and/or its listeners.

8. We do agree with College that it is possible that Station KCFS could be required to change from Channel 252A to Channel 233A if the pending proposal in MM Docket No. 90-472 to substitute Channel 254C for Channel 254C1 at Pipestone, Minnesota, and modify the license of Station KISD accordingly, is adopted and that this could be unnecessarily disruptive. Therefore, we will modify Station KCFS's license to Channel 233A, thus avoiding the uncertainty which could be occasioned by the pendency of the rule making. If Channel 254C is allotted to Pipestone, the licensee of Station KISD will be required to share with Big Sioux the reimbursement costs to which Station KCFS is entitled. Channel 233A can be allotted to Sioux Falls in compliance with the Commission's minimum distance separation requirements and can be used at Station KCFS's presently licensed transmitter site.[2]

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Sioux Falls, South Dakota	223C, 233A, 243C, 247C1, 270C2, 279C2, 284C

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Sioux Falls College for Station KCFS, Sioux Falls, South Dakota, IS MODIFIED to specify operation on Channel 233A in lieu of Channel 261A, subject to the following conditions:

> (a) Nothing contained herein shall be construed as authorizing any change in Station KCFS's license, BLED-880817LL, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).
>
> (b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLED-880817LL, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

11. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Memorandum Opinion and Order* by Certified Mail, Return Receipt Requested, to the licensee, as follows: Sioux Falls College, 1501 South Prairie Avenue, Sioux Falls, South Dakota 57105.

12. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Sioux Falls College IS DENIED.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

[2] The coordinates for Channel 233A at Sioux Falls are North Latitude 34-31-57 and West Longitude 96-44-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-298

In the Matter of

Amendment of Section 73.202(b), RM-7803
Table of Allotments,
FM Broadcast Stations.
(Lake George, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 30, 1991; Released: October 10, 1991

Comment Date: December 2, 1991
Reply Comment Date: December 17, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by William H. Walker, III ("petitioner"), requesting the allotment of Channel 253A to Lake George, New York, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 253A to Lake George, New York, as it could provide the community with its first local FM service. Channel 253A can be allotted to Lake George in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] We recognize that this allotment would be short-spaced to Station CIEL-FM, Channel 253C1, Longueuille, Quebec, Ontario, at both its licensed and proposed antenna sites. However, we have determined that no prohibited interference would result from the Channel 253A allotment at Lake George. Therefore, since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border, we have requested concurrence by the Canadian Government in the allotment of Channel 253A to Lake George, New York, as a specially negotiated allotment.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Lake George, New York	--	253A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 2, 1991,** and reply comments on or before **December 17, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William H. Walker, III
1151 Route 44-55
Clintondale, New York 12515-9702
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 253A at Lake George are North Latitude 43-25-42 and West Longitude 73-42-48.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-214

In the Matter of

Amendment of Section 73.202(b),	RM-7101
Table of Allotments,	RM-7226
FM Broadcast Stations.	
(Homerville, Lakeland and	
Statenville, Georgia)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1991; Released: October 10, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 2685 (1990), issued in response to two separate petitions for rule making. Lakeland Broadcasters, Inc. ("Lakeland"), permittee of Station WHFE(FM), Channel 290A, Lakeland, Georgia, requested the substitution of Channel 290C3 for Channel 290A at Lakeland, Georgia, and the modification of its construction permit (BPH-870910NV) for Station WHFE(FM) to specify operation on the higher class channel. Lakeland also requested the substitution of Channel 254A for Channel 288A at Homerville, Georgia, and the modification of Station WBTY(FM)'s license accordingly, in order to permit the upgrade at Lakeland (RM-7226). LaTaurus Production, Inc. ("LaTaurus"), requested the allotment of Channel 254A to Statenville, Georgia, as that community's first local FM service (RM-7101). Lakeland, LaTaurus and HVS Partners ("HVS"), licensee of Station WBGM(FM), Channel 255C1, Tallahassee, Florida, filed comments. Lakeland and LaTaurus filed reply comments.[1]

2. The *Notice* raised the issue of whether Statenville is a community for allotment purposes, since it is neither listed in the U.S. Census nor incorporated.[2] In response, LaTaurus states that Statenville has a population of 650, according to the *Rand McNally Road Atlas*. It serves as the county seat of Echols County, which has a population of 2,297, according to the 1980 U.S. Census. LaTaurus submits a Georgia Department of Transportation Map of Echols County, which shows Statenville as the county seat,[3] and a non-official map of Statenville prepared by the South Georgia Area Planning and Development Commission. LaTaurus claims that Statenville is the location for the county judicial system and the Office of the County Board of Commissioners. LaTaurus contends that Statenville has a post office, a sheriff's office, a volunteer fire station, schools, a welfare service office, a public library and offices for health and agricultural services. LaTaurus states that the offices for each of these municipal services are connected directly to Statenville, and are located in downtown Statenville. It argues that there are road signs at Georgia Interstate Highways 94 and 129 that indicate entrance to Statenville and road signs along highways that indicate to motorists the number of miles before entering Statenville. LaTaurus goes on to state that Statenville is an economically active community, noting a number of commercial establishments located in Statenville including the Delta Grocery, Holiday Market, Statenville Hardware and Mill Supply Store, Rowland Sales and Tractor Repair, Canty's Wrecker Service and Auto Repair, Georgia Farm Bureau and Insurance Company, the Statenville Snack Bar and the Kountry Cafe. There is a community center, a Statenville chapter of the Lions Club, the Statenville Baptist Church, the Statenville United Methodist Church, the Statenville Church of God and the Statenville Church of God of Prophesy. LaTaurus also includes an article from the *Valdosta Daily Times* with a Statenville date line and an economic profile of Statenville prepared by the Georgia Department of Industry and Trade. Therefore, LaTaurus contends Statenville is clearly an independent and distinct community with a readily identifiable residential and business district, and should be identified as a community for allotment purposes. LaTaurus states that it will apply for the channel, if allotted.

3. Lakeland contends that Statenville lacks sufficient social, economic or cultural indicia to qualify as a "community" for allotment purposes. It states that the Commission has traditionally relied upon the existence of such indicia as the availability of municipal services, schools, libraries, churches, shopping centers and banks designed to serve primarily the specified community, citing *Coker, Alabama*, 43 RR 2d 190 (1978). Moreover, Lakeland claims, a community must have identifiable boundaries to assure that principal community coverage requirements can be met, citing *Naples, Florida*, 41 RR 2d 1549 (1977). Lakeland submits an affidavit from a consulting engineer who visited Statenville which claims that the area referred to as Statenville has no identifiable boundaries and is nothing more than a few buildings clustered within Echols County at the intersection of State Highway 94 and U.S. Highway 129. Lakeland also contends that the school, library and police services in Statenville are provided by Echols County, and there is no indication that those services are intended primarily for Statenville. However, Lakeland argues that if the Commission determines that Statenville is a community, Channel 248A could be allotted to Statenville instead of Channel 254A, thereby removing the conflict with Lakeland's proposal.

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[1] After the close of the reply comment period, LaTaurus filed supplemental comments and Lakeland filed a response. The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period. *See* Commission Rule 1.415(d). Therefore, we will not consider these pleadings.

[2] In addition, we also asked parties to address the applicability, if any, of the "quiet village" doctrine. In restrospect, we believe that determination is not applicable in the context of this proceeding. Therefore, we will not address this issue.

[3] We note that the Echols County map contains the following information: "Statenville is incorporated as Statesville but is locally known as Statenville."

4. HVS in comments states that it is currently licensed to operate Station WBGM(FM), Channel 255C1, Tallahassee, Florida. However, HVS claims that it is unable to increase its antenna height to the allowable 299 meters, because of Federal Aviation Administration concerns. HVS states that it must consider two airports which prohibit tall structures in finding a tower location. HVS has an application on file (BPH-891004IC) to relocate Station WBGM's transmission facilities, change its effective radiated power to 17.6 kilowatts and increase its antenna height to 568 meters above average terrain in order to operate at full class C1 facilities. HVS states that the Homerville channel substitution and the Statenville allotment would be short spaced to the new transmitter site specified in its pending application. HVS argues that as a matter of policy, its application should take precedence over the later-filed Statenville petition. HVS also argues that its application should take precedence over the Lakeland proposal, as well as the Tallahassee station would serve more people than the Lakeland upgrade.

5. In reply comments Lakeland claims that LaTaurus has exaggerated and mischaracterized various attributes of the area referred to as Statenville. Lakeland submits a statement from its consulting engineer claiming that Statenville is nothing more that a group of buildings that is a part of Echols County. Lakeland argues that the various government agencies LaTaurus attributes to Statenville are actually operated by Echols County. It claims that there is no sign on the volunteer fire department or various government offices linking any of these facilities with Statenville. The engineer claims he could not find several of the businesses that LaTaurus claims are in Statenville, and that one of the businesses is actually a tow truck located outside of someone's home. LaTaurus argues that the Echols County Map is unreliable, as the map does not explain the basis for the determination of Statenville's boundaries or the claim that Statenville is incorporated as "Statesville." As for HVS' opposition, Lakeland contends that HVS seeks merely to reserve a preferred transmitting site. Lakeland argues that HVS fails to claim that its site is unique or to claim that other non-short-spaced sites are unavailable. Lakeland submits an engineering study suggesting that there is an area in which HVS could construct a new tower in compliance with the Commission's spacing requirements.

6. In reply comments, LaTaurus states that Statenville possesses sufficient social, economic and cultural indicia to qualify as a community for allotment purposes. LaTaurus submits a number of photographs depicting road signs which demonstrate the entrance to Statenville and photograph depicting the U.S. Post Office in Statenville. LaTaurus argues that Lakeland's proposal to allot Channel 248A to Statenville as a 6 kilowatt Class A facility is not viable, as the specified site is "at the heart of the Okefenokee swamp." LaTaurus claims that the "vast portion" of the area available for a tower for Channel 248A is wet and swampy. Furthermore, LaTaurus claims that only half of the community of Statenville would receive city grade coverage from Channel 248A. Finally, LaTaurus notes that Channel 248A can not be allotted to Statenville as a 3 kilowatt Class A facility. It states that since the proposal was filed after October 2, 1989, the proposal must be considered under the new spacing requirements adopted in *Amendment of Part 73 of the Rules to Provide for an Additional FM Class (Class C3) and to Increase the Maximum Transmitting Power for Class A Stations ("6 kW Order")*, 4 FCC Rcd 6375 (1989).

7. In response to HVS's claim that its minor modification application should be given priority over LaTaurus's proposal, LaTaurus contends that there is no legal precedent for the proposition that HVS should be given priority merely because it filed its proposal before LaTaurus. Moreover, LaTaurus maintains that allotment of channels to communities as a first local service is given first priority over most other proposals, including a conflicting proposal to change the location of a transmitter site. LaTaurus argues that an application constitutes a mere preference to operate at a given location, and this preference does not prevail over a proposal for a first local service, citing *Hilton Head, South Carolina*, 3 FCC Rcd 4312, (1988); *Topsail Beach, North Carolina*, 3 FCC Rcd 159 (1988); *Freedom and Morgan Hill, California*, 2 FCC Rcd 2182 (1987); *Las Vega, Nevada*, 59 RR 2d 1330 (1986); *Andalusia, Alabama*, 49 FR 33301, August 13, 1984.

8. The Commission's policy is that, if a community is not incorporated or listed in the census reports, the proponents of an allotment must show the place to be a geographically identifiable population grouping or show objective indications of the existence of a common perception that a locality's populace constitutes a distinct "geographical population grouping." The proponent need not show that the borders of the locality are precisely ascertainable nor does the Commission require a municipality to provide every public service on its own in order to merit community status. *See Beacon Broadcasting*, 2 FCC Rcd 3469 (1987), *recon. denied*, 2 FCC Rcd 7562 (1987); and *Semora, North Carolina*, 5 FCC Rcd 934 (1990). The record indicates that objective indicia of community status are present in Statenville. Statenville is listed as the county seat of Echols County in the *Rand McNally Commercial Atlas and Marketing Guide* (1988) and is the location for the County Board of Commissioners. LaTaurus states that Statenville has a civic organization (a Statenville chapter of the Lions Club), four churches which have Statenville in their names, a community center, and some businesses. There is a post office and fire station in the community. Even if some of the municipal services, such as the school, library and police services are provided by the county, the Commission stated in *Semora*, "[T]he Commission does not require a municipality to provide every public service on its own in order to merit community status [note omitted]. Similarly, the absence of a newspaper or a bank is not fatal to community status." 5 FCC Rcd at 935. In addition, LaTaurus submitted a article from the *Valdosta Daily Times* with a Statenville date line and an economic profile of Statenville prepared by the Georgia Department of Industry and Trade, which is also evidence that the residents of Statenville function and conceive of themselves as a community. Therefore, we find that Statenville is a community for allotment purposes.

9. We also note that HVS's application represents a mere site preference, and therefore does not present sufficient public interest benefit to warrant preferring it over the LaTaurus and Lakeland proposals. *See Angola, et al., Indiana; Brooklyn, et al., Michigan*, 6 FCC Rcd 1230 (1991); *Cookeville, et al., Tennessee*, 5 FCC Rcd 677 (1990); *Andalusia, Alabama*, 49 FR 32201, August 13, 1984. HVS has presented no information to show that its

site is unique and that there are no other suitable transmitter sites available. Lakeland and LaTaurus both submitted engineering information which suggest that there is an area in which HVS could construct a new tower in compliance with the Commission's spacing requirements. Further, HVS does not claim that its proposed facility will provide a greater public benefit, such as the provision of a first or second fulltime aural service, than would accrue from providing Statenville with its first local FM service. *See Belvidere, New Jersey, Scranton and Tannersville, Pennsylvania*, 6 FCC Rcd 1331 (1991).

10. In an attempt to resolve the technical conflicts between the LaTaurus proposal for a new allotment at Statenville and Lakeland's proposal to upgrade service at Lakeland, the staff performed an engineering search to determine if alternate channels were available. Our study shows that there is no alternate channel available as an upgrade for Lakeland or alternate Class A allotment for Statenville.[4] We do not believe that Statenville would receive city grade coverage on Channel 248A from the restricted site of 16.9 kilometers, since the maximum distance for city grade coverage for Class A stations are 16.2 kilometers. In addition, the proposed site is in a swamp, and much of the area consists of wetlands. Therefore, site flexibility would be limited. As a result, we will not allot Channel 248A to Statenville.

11. We must comparatively consider these proposals. Under the Commission's FM allotment priorities, a first local FM service is generally preferred over a proposal to upgrade an existing facility. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982); *see also Benton, Arkansas*, 2 FCC Rcd 1963, 1965 (1987); *LaFayette, Tennessee*, 6 FCC Rcd 3289 (1991). We find that the provision of a new first service at Statenville must be preferred over the proposal to upgrade existing service in Lakeland.

12. Therefore, we believe the public interest would be served by allotting Channel 254A to Statenville, Georgia, as that community's first local FM service. Channel 254A can be allotted to Statenville in compliance with the Commission's minimum distance separation requirements with a site restriction 12.9 kilometers (8.0 miles) northeast.[5]

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Statenville, Georgia	254A

14. The window period for filing applications will open on **November 26, 1991,** and close on **December 26, 1991**.

15. IT IS FURTHER ORDERED, That the request of Lakeland Broadcasters, Inc., requesting the substitution of Channel 290C3 for Channel 290A at Lakeland, Georgia, and the substitution of Channel 254A for Channel 288A at Homerville, Georgia (RM-7101) IS DENIED.

16. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to HVS Partners, 8900 Harvest Square Court, Potomac, Maryland 20854.

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[4] Because the Statenville petition was filed after October 2, 1989, it must be examined pursuant to the six kilowatt Class A spacing requirements. *See Second Report and Order* in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989).

[5] The coordinates for Channel 254A at Statenville are North Latitude 30-47-05 and West Longitude 82-55-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Application for Review
of Denial of Six Months
Endorsement to

Charles F. Murray

First Class Radiotelegraph
Operator's Certificate

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 1991; Released: October 11, 1991

By the Commission:

1. The Commission has before it an Application for Review (Application) filed pursuant to 47 C.F.R. §1.115(a) by Charles F. Murray (Petitioner) seeking review of the Chief, Field Operations Bureau's denial of Murray's application for a Six-Months-Service Endorsement to his First Class Radiotelegraph Operator's Certificate.

2. Section 1.104(b) of the Rules, 47 C.F.R. §1.104, states that "[a]ny person desiring Commission consideration of a final action taken pursuant to delegated authority shall file either a petition for reconsideration or an application for review (*but not both)* within thirty days from the date of public notice of such action, as that date is defined in §1.4(b) of these rules." (Emphasis added.)[1]

3. On November 13, 1990, by Certified Mail, the Chief, Public Service Division, under authority delegated to the Chief Field Operations Bureau, denied Petitioner's application for a Six-Months-Service Endorsement (Endorsement). Petitioner timely filed a Petition for Reconsideration on December 3, 1990. Subsequently, on December 10, 1990, Petitioner also filed an Application for Review. Because of the limitations imposed by §1.104(b) with regard to review of both a Petition for Reconsideration and an Application for Review, we will respond to only one of these, the Application for Review.[2]

4. Petitioner contends that the denial of the Endorsement on the basis that the creditable service being claimed was performed aboard a ship which was not in compliance with the Act is contrary to the Act and the Commission's Regulations and policy. Petitioner argues that the plain meaning of Section 353(b) of the Act, the requirements of Section 13.12(b), 47 C.F.R. §13.12, and the Commission's policy, as articulated in the Commission's October 14, 1988, Report and Order, *In the Matter of Amendment of Parts 13 and 80 of the Rules Concerning Ship Radio Officer Qualifying Service Endorsements (3 FCC Record 6361 (1988)*) (Report and Order) do not support the interpretation relied on by the Chief, Public Service Division, to deny the endorsement.

5. Section 353(b) of the Act states:

> A cargo ship which in accordance with this part is equipped with a radiotelegraph station, which is equipped with a radiotelegraph auto alarm, shall, for safety purposes, carry at least one radio officer who shall have had at least six months' previous service in the aggregate as a radio officer in a station on board a ship or ships of the United States.

One of the regulatory sections implementing this requirement is Section 13.12, 47 C.F.R. §13.12(b). That provision sets out the requirements for obtaining a Six-Months-Service Endorsement for a first or second Class radio operator license. The Endorsement is added to a First or Second Class Radiotelegraph Operator's Certificate as evidence of the required six months of radio operator service. To obtain an Endorsement pursuant to Section 13.12(b), an applicant must demonstrate that:

> (i) The applicant was employed as a radio operator on board a ship or ships of the United States for a period totalling at least six months;
>
> (ii) *The ships were equipped with a radio station complying with the provisions of Part II of Title III of the Communications Act, or the ships were owned and operated by the U.S. Government*, for example the U.S. Navy of (sic) U.S. Coast Guard, and equipped with radio stations (emphasis added);
>
> (iii) The ships were in service during the applicable six month period; however, any portion of in port periods that exceed seven days must be excluded from the qualifying six months period;
>
> (iv) The applicant held a first or second class radiotelegraph operator's certificate issued by the FCC during this entire six-month qualifying period; and,
>
> (v) The applicant holds a radio officer's license issued by the U.S. Coast Guard at the time the six month service endorsement is requested.

6. Contrary to Petitioner's argument, the requirement that an applicant must perform the qualifying service aboard a vessel which complies with the requirements of Part II of Title III, *is* embodied in the regulations. The second requirement, which states that an applicant must show that "the ships were equipped with a radio station complying with the provisions of Part II of Title III of the Act, *or* that the ships were owned *and* operated by the U.S. Navy of [sic] Coast Guard, and equipped with radio stations" (emphasis added) is clear. To obtain the Endorsement, therefore, Petitioner needed to show that the vessels aboard which the qualifying service was obtained either complied with Part II, Title III ship station requirements, or were owned and operated by the U.S. government.

7. Section 13.12(b) is rooted in Section 353 of the Act. That Section states that Part II, Title III, vessels must carry two radio officers, or one radio officer provided that the radiotelegraph station is equipped with a radiotelegraph auto alarm, *and* that the sole radio officer has had at least six months' previous service in the aggregate as a radio officer. Petitioner lacked the Endorsement evidencing the required six months of service. The vessel Petitioner sailed on - the *STATE OF MAINE* - was non-compliant in that its sole radio officer, the Petitioner, did not have the

Endorsement necessary to sail as the sole radio operator. Further, the vessel was not owned *and* operated by the U.S. government for purposes of Part II of Title III and implementing rules because it is a Maritime Administration ship. [3] Petitioner now seeks to use this experience, garnered as it was in violation of the requirements of the Act and Regulations, to obtain a higher privilege, the Endorsement.

8. By Petitioner's own statements to the Commission he sailed as the sole radio officer aboard the STATE OF MAINE, a vessel which is not exempt from the requirements of the Act. Since Petitioner did not and does not have an Endorsement to his First Class Radiotelegraph license, he caused the vessel to be noncompliant.

9. The Commission is not imposing any requirements on Petitioner that are not based on the Act or the Regulations. Had petitioner performed the service for which he seeks an Endorsement aboard a Part III, Title III vessel, where he could sail as the sole radio operator without an endorsement, his service would be creditable. Further, it has always been the Commission's policy to examine an applicant's knowledge and willingness to adhere to the Rules and the Act. When an applicant presents conflicting information, or information which calls into question the veracity or accuracy of other documentation, the Commission has a responsibility to question and examine the information and documents.

10. Contrary to Petitioner's assertion that the Commission improperly requested information beyond the certifications, nothing in the Commission's policies or Rules limit the Commission's consideration of materials other than those suggested in Section 13.12(b) of the Rules. In fact, in its *Report and Order* of October 14, 1988, the Commission clearly stated that it retained authority to investigate questions regarding the accuracy of certifications on a "case by case" basis. *See Report and Order*, 3 FCC Rcd 6361, 6364 (1988). The Commission's request that Petitioner produce ship radio logs was made as part of its procedures when questions are raised regarding the accuracy or veracity of an application. In this case, the fact that Murray submitted a statement from the Master of the Vessel which states that Murray served as the "Chief Radio Officer," as well as his statements to the Chief of the Radio Operator Branch acknowledging this fact, led the staff to seek further information. It therefore did not act in an improper manner by requesting the submission of ship radio logs in an effort to verify Petitioner's service. In any event, having requested and received the information, the Commission cannot simply ignore it.

11. Finally, Petitioner argues that the Commission should be estopped from denying the application based upon the vessel's non-compliance because an FCC ship inspector had assured Petitioner that "since the STATE OF MAINE was government owned, the ship was exempt from the normal rule." (*Application*, at p.6).

12. The Commission does not dispute the veracity of Petitioner's assertion that he was misinformed by a Commission ship inspector. It is a long standing principle of administrative procedure, however, that the acts or omissions of an agency official do not excuse requirements imposed by the Act or Regulations. *Malkan FM Associates v. FCC*, No. 90-1281 (D.C. Cir. June 14, 1991; *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960 (D.C. Cir. 1990), *Reuters Limited v. FCC*, 781 F.2d 946 (D.C. Cir. 1985).

13. Further, Petitioner has failed to establish that he reasonably relied on the FCC inspector's erroneous advice. Petitioner accepted employment as the sole radio officer prior to the ship inspection and receipt of the erroneous advice.[4] Further, by refusing to grant an Endorsement to an applicant who has not met all of the requirements for obtaining an endorsement the Commission is only adhering to its own rules, not penalizing the Petitioner. Were the Commission to deny otherwise creditable service to an eligible applicant it could be said to be penalizing the applicant. That is not the case. Simply put, the Petitioner was already sailing as a sole radio officer aboard a vessel which requires two radio officers or one radio officer with a six month service endorsement. He was given erroneous information by a Commission official. He now seeks to use this to his advantage by asking the Commission to further disregard its rules.

14. We have reviewed the Bureau's action and find no error. Accordingly, IT IS ORDERED that, pursuant to Section 1.115(g) of the Commission's Rules, 47 C.F.R. §1.115(g), Charles F. Murray's request that the Commission grant him a Endorsement to his First Class Radiotelegraph Operator's Certificate is hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 1.4(b), 47 C.F.R. §1.4, states that for purposes of calculating the date of "public notice" for Commission actions such as the action here appealed, which are not made the subject of a released document entitled "Public Notice", the date of "public notice" shall be the day after the date appearing on the document sent (*e.g.*, mailed, telegraphed, etc.).

[2] Unlike the Application for Review, the Petition was filed without benefit of legal counsel. The Application for Review raises all issues raised in the Petition for Reconsideration, but is more complete in its exposition of the legal and factual issues raised. Because we believe the public interest would be better served in the instant case by addressing the issues raised in the Application for Review, we have chosen to respond to the Application for Review. *In the Matter of Dial-A-Page, Inc.*, 75 FCC 2d 432, 440.

[3] Section 352 of the Act, which exempts ships "belonging to and operated by the Government" from the requirements of Part II specifically excludes those vessels operated by the Maritime Administration from that exception. 47 U.S.C. § 352(a)(2).

[4] We also reject Petitioner's contention that it is the master of the vessel, not him, who is ultimately responsible for the compliance of the vessel. Section 360 of the Act does indeed state that ships of the United States are "under the supreme control of the master." But Section 360 makes it clear that even the master's control takes a back seat to the requirements of rules, regulations, or international agreements.

> The radio installation, the operators, the regulation of their watches, the transmission and receipt of messages, and the radio service of the ship *except as they may be regulated by law or international agreement, or by rules*

and regulations made in pursuance thereof, shall in the case of a ship of the United States be under the supreme control of the master. (Citations omitted; emphasis added.)

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 85-171

In the Matter of

Technical Flexibility in the
Mobile Communications Services,
Rules Parts 2, 22, 74, and 90.

ORDER TERMINATING PROCEEDING

Adopted: September 9, 1991; Released: October 2, 1991

By the Commission:

1. In the *Notice of Inquiry and Proposed Rule Making* (*Notice*) and *Further Notice of Proposed Rule Making* (*Further Notice*) the Commission requested comments on a new form of equipment testing and authorization entitled "Alternative Type Acceptance" (ATA).[1] ATA would permit the introduction of new spectrum efficient equipment and technology into existing land mobile radio bands in a more efficient manner.

2. We have recently initiated a new proceeding, PR Docket No. 91-170,[2] containing many of the issues raised in the *Notice* and *Further Notice*. The new *Notice of Inquiry* examines technical flexibility for the private land mobile radio services, in the bands primarily below 470 MHz, in an extremely broad context. The new *Notice of Inquiry* is intended to consider the issues involved in introducing new spectrum efficient equipment and technology into the existing private land mobile radio bands.[3] Thus, we have incorporated the record of this proceeding, as it pertains to licensees under Part 90 of our rules, into the record of PR Docket No. 91-170.

3. Accordingly, IT IS ORDERED that under the authority contained in Sections 4 (i) and 33 of Communications Act of 1934, as amended, this proceeding IS TERMINATED without further action.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

[1] Notice of Inquiry and Proposed Rule Making, GEN. Docket No. 85-171, 50 Fed. Reg. 25274 (1985), and Further Notice of Proposed Rule Making, GEN. Docket No. 85-171, 3 FCC Rcd 1655 (1988).

[2] Notice of Inquiry, PR Docket No. 91-170, FCC No. 91-187 (1991).

[3] The vast majority of licensees who could benefit from ATA are private land mobile radio licensees eligible under Part 90.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-141

In the Matter of

Expanded Interconnection	RM-7249
with Local Telephone	ENF-87-142
Company Facilities	

SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING

Adopted: September 27, 1991; Released: October 4, 1991

Comment Date: November 5, 1991
Reply Date: November 26, 1991

By the Commission:

I. INTRODUCTION

1. This Supplemental Notice of Proposed Rulemaking seeks comment on the appropriate level of distance sensitivity in the special access rates of all local exchange carriers (LECs).[1] We recently sought comment on similar issues with respect to switched access in the *Transport* proceeding.[2]

II. BACKGROUND

2. On June 6, 1991, the Commission issued a Notice of Proposed Rulemaking and Notice of Inquiry in this proceeding.[3] The *Expanded Interconnection Notice* proposed to require that Tier I LECs[4] provide expanded interconnection for interstate special access to all third parties, and began an inquiry concerning expanded interconnection for the provision of interstate local transport. The Notice also sought comment on certain aspects of LEC special access pricing.

III. DISCUSSION

3. In comments filed in response to our January 1991 Request for Information to Supplement the Record in the *Transport* proceeding,[5] the Competitive Telecommunications Association (CompTel) argued that the cost of the fiber optic facilities commonly used to provide both transport and special access services is largely insensitive to distance. CompTel also argued that the degree of distance sensitivity currently reflected in LEC rates for transport and special access varies widely from service to service, and from LEC to LEC, with no apparent justification.[6] CompTel contends that the distance sensitivity in LEC rates seriously disadvantages the smaller interexchange carriers (IXCs). A number of the BOCs have challenged CompTel's analysis of distance sensitivity issues.[7]

4. We have concluded that the issues raised by CompTel merit consideration. We requested comment in the *Transport* proceeding on the extent to which transport rates should be distance sensitive.[8] We are including the special access distance sensitivity issue in the present proceeding since it already includes issues concerning LEC special access pricing.[9] Accordingly, we are expanding the scope of this proceeding to request comment on the extent to which rates for special access should be distance sensitive. Consideration of this issue will not be limited to Tier 1 LECs. Thus, any new requirements or policies concerning distance sensitivity may be applied to all LECs.

IV. PROCEDURAL MATTERS

A. *Ex Parte*

5. This is a non-restricted notice and comment rulemaking. *Ex parte* presentations are permitted, except during the Sunshine period, provided they are disclosed as provided in the Commission's rules. *See generally*, 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

B. Regulatory Flexibility Act

6. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because the proposed rule amendments, if promulgated, would not have a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Carriers providing interstate transport services directly subject to the proposed rule amendment do not qualify as small businesses since they are dominant in their field of operation. The Commission will, however, take appropriate steps to ensure

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[1] *See* paragraph 4, *infra*.

[2] MTS and WATS Market Structure, CC Docket No. 78-72 and Transport Rate Structure and Pricing, CC Docket No. 91-213, (released August 30, 1991) (*Transport* Notice), at para. 20.

[3] Expanded Interconnection with Local Telephone Company Facilities, Notice of Proposed Rulemaking and Notice of Inquiry, 6 FCC Rcd 3259 (1991) (*Expanded Interconnection* Notice).

[4] Tier I exchange carriers are those with more than $100 million in annual regulated revenues for a sustained period of time.

[5] MTS and WATS Market Structure, CC Docket No. 78-72, 6 FCC Rcd 594 (1991).

[6] CompTel Comments in MTS and WATS Market Structure, CC Docket No. 7872, filed February 22, 1991, at 28-31. *See also*, CompTel's Petition to Reject or, in the Alternative, to Suspend and Investigate, filed May 14, 1991 in 1991 Local Exchange Carrier Annual Access Tariff Filings, at 5-6.

[7] *See, e.g.*, NYNEX Reply Comments at Appendix G, pages 2-5, 1991 Local Exchange Carrier Annual Access Tariff Filings, NYNEX Telephone Companies Tariff FCC No. 1, Transmittal No. 24, May 23, 1991; Bell Atlantic Reply Comments at Appendix A, Item 7, 1991 Annual Access Tariff Filings, Bell Atlantic Telephone Companies Tariff FCC No. 1, Transmittal Nos. 425 and 436, May 23, 1991.

[8] *Transport* Notice at para. 20.

[9] For example, we noted that, in light of the proposal for expanded interconnection, it may be appropriate to consider whether to establish new guidelines for review of LEC rate structure responses to competition. 6 FCC Rcd at 3266, para. 45.

that the special circumstances of the smaller LECs are carefully considered in resolving these issues. The Secretary shall send a copy of this Supplemental Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

C. Notice and Comment Provision

7. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before November 5, 1991, and reply comments on or before November 26, 1991. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Downtown Copy Center, 1114 21st Street, N.W., Suite 140, Washington, D.C. 20554. For further information regarding this Supplemental Notice of Proposed Rulemaking, contact Douglas Slotten, Common Carrier Bureau, Policy and Program Planning Division, (202) 632-9342.

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of regulatory changes in the special access rate structure described above, and that COMMENT IS INVITED on these issues.[10]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[10] These actions are taken pursuant to Sections 1, 4(i) and (j), 201-205, 218, 220, and 403 of the Communications Act as amended, 47 U.S.C. §§151, 154(i) and (j), 201-205, 218, 220, and 403.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 2, 1991

AT&T AND UNITED AIR LINES WITH COVIA PARTNERSHIP FILE PETITIONS FOR LIMITED WAIVER OF ORDER ADOPTED IN CC DOCKET NO. 90-132

Pleading Cycle Established

On September 23, 1991, American Telephone & Telegraph Company (AT&T) filed a "Petition for Limited Waiver of the Grandfathering Date of Tariff 12 Options" established by the Commission pursuant to Competition in the Interstate Interexchange Marketplace, Report and Order, CC Docket No. 90-132, FCC 91-251, released Sept. 16, 1991 (*Interexchange Order*). On September 24, 1991, United Air Lines, Inc. (United) and Covia Partnership (Covia) filed a "Petition For Limited Waiver Of Cut Off Date For Filing Certain Tariff 12 Options" adopted in the *Interexchange Order*.

Those parties interested in filing comments in response to either of these petitions for waiver should do so no later than October 15, 1991. Reply comments should be filed no later than October 21, 1991.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules. In addition, one copy of each pleading must be filed with Downtown Copy Center (DCC), the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of AT&T's waiver petition, the United/Covia waiver petition, and other related documents may be obtained from DCC. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W.

For further information, contact Judy Argentieri, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

United Telephone System Companies' Permanent Cost Allocation Manuals for the Separation of Regulated and Nonregulated Costs — AAD 90-22

ORDER ON RECONSIDERATION

Adopted: October 3, 1991; Released: October 4, 1991

By the Chief, Common Carrier Bureau:

1. On September 6, 1991, we released a Memorandum Opinion and Order accepting certain revisions to the United Telephone Systems Companies' (United) cost allocation manuals (CAMs) for the separation of regulated and nonregulated costs and consolidating those CAMs into a single CAM.[1] As discussed in that order, MCI Telecommunications Corporation (MCI), in its comments on one of these revisions, claimed that United was providing a service to one of its affiliates, US Sprint, that was not listed in the affiliate transactions section of the United CAM.[2] In its reply, United stated that the service in question did not need to be listed as an affiliate transaction because it is the product of a sales agency agreement between a United local exchange carrier (LEC) and US Sprint and is properly described in the United CAM as a nonregulated activity.[3] We concluded that MCI's claim was without merit, and that United's treatment of this service in its CAM was appropriate.[4]

2. In accordance with Section 1.108 of the Commission's rules,[5] we are reconsidering on our own motion the conclusion we reached on this issue. Pursuant to Commission requirements, each CAM must include "[a] statement identifying affiliates that engage in or will engage in transactions with the carrier entity and describing the nature, terms, and frequency of such transactions."[6] All affiliate transactions must be listed. The fact that the service is provided under a sales agency agreement or that the service is nonregulated has no bearing on the issue.[7]

3. Accordingly, IT IS ORDERED, pursuant to Sections 0.91, 0.291, and 1.108 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.108, that United must revise the affiliate transactions section of its CAM to describe the nature, terms, and frequency of each service provided by the United Telephone System Companies to US Sprint. This revision must be submitted within thirty (30) days of the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] United Telephone System Companies' Permanent Cost Allocation Manuals for the Separation of Regulated and Nonregulated Costs, AAD 90-22, *Memorandum Opinion and Order*, DA 91-1093 (Com. Car. Bur. 1991).
[2] *Id.*, at para. 5.
[3] *Id.* at para. 6.
[4] *Id.* at para. 8.
[5] 47 C.F.R. § 1.108.
[6] Separation of Costs of Regulated Telephone Service from Cost of Nonregulated Activities, Report and Order, CC Docket 86-111, 2 FCC Rcd 1298, 1328 (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6283 (1987) (*Reconsideration Order*) *modified on further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.* Southwestern Bell Corp. v. FCC,896 F. 1378 (D.C. Cir. 1990).
[7] *See* Bell Atlantic Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 5 FCC Rcd 2551, 2552, para. 9 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3324

Revisions to Tariff F.C.C. No. 2

ORDER

Adopted: October 3, 1991; Released: October 3, 1991

By the Chief, Common Carrier Bureau:

1. On July 31, 1991, AT&T Communications (AT&T) filed Transmittal No. 3324 to introduce a limited-time promotional offering for its MEGACOM 800 Service Term Plan. To qualify, customers must order at least one new 800 Customer Specific Term Plan (CSTP) for use with a new MEGACOM 800 Service and at least one new terrestrial 45 Mbps local channel for access to at least one new MEGACOM 800 Service routing arrangement. The T45 local channels and the MEGACOM 800 Service routing arrangements must be ordered concurrently.

2. Customers qualifying for the promotion will receive partial waivers of certain one-time charges and a credit of $63,000 for the first routing arrangement ordered, which can be applied against future domestic MEGACOM usage. However, if the customer discontinues the arrangement or fails to meet its minimum total net billed usage revenue level of $120,000 per routing arrangement at the end of the twelfth billing month, AT&T will bill the customer for all charges waived and all credits received under the promotion, and for the difference between $120,000 and the actual net billed usage (after applying the CSTP discount).

3. On August 7, 1991, MCI Communications Company (MCI) filed a petition to reject Transmittal 3324. MCI contends that Transmittal 3324 is unjust and unreasonable under Section 201(b), and that AT&T's purpose is to minimize the effects of 800 number portability by binding its customers to multi-year contracts that extend beyond the date for 800 number portability. MCI Petition at 1-2. MCI also maintains that AT&T is attempting to leverage its position in the 800 Services market to reduce competition. *Id.* at 2-4. Finally, MCI contends that the discounts and penalties for discontinuance in Transmittal 3324 constitute an improper "lock-in" of customers. *Id.* at 4-5.

4. AT&T responds that MCI's petition is a procedurally improper collateral attack against the CSTP tariff. AT&T Reply at 1-2. It counters that the terms of its CSTP are commensurate with those of its competitors, and that if 800 term plans are problematic to 800 number portability, all vendors' term plans should be equally suspect. *Id.* at 2-3. Moreover, AT&T maintains that MCI's charge of leveraging is incorrect since AT&T has no market power with respect to its services, and adds that Transmittal 3324 affects only 800 Services. *Id.* at 3-4. Finally, AT&T asserts that MCI's "lock-in" argument is without merit, since subscription to a CSTP is optional. *Id.* at 5-6.

5. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 3324 and related pleadings. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 3324, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CORPORATE TELECOM SERVICES, INC. File No. 10274-CL-P-537-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 537, Nebraska 5-Boone

MEMORANDUM OPINION AND ORDER

Adopted: October 4, 1991; Released: October 11, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Corporate Telecom Services, Inc. (CTSI) has petitioned the Common Carrier Bureau (Bureau) to reconsider the Mobile Services Division's (MSD) action returning the captioned application as unacceptable for filing.[1] CTSI contends that the MSD erred in its determination that the application violated the cross-ownership restrictions contained in Section 22.921 of the Commission's rules. CTSI requests that its application be reinstated. For the reasons discussed below, we deny CTSI's request.

II. BACKGROUND

2. CTSI filed its application for Nebraska 5-Boone on September 16, 1988. On February 23, 1989, SSE Telecom Inc. (SSE), CTSI's corporate parent, transferred all of CTSI's stock to SSE's president, Wilbur Pritchard, as trustee for the benefit of SSE's shareholders. SSE states that it took this action in order to insulate CTSI from a recapitalization of SSE, which resulted in a major (65%) change in the ownership and control of SSE.[2] The recapitalization also increased the interest of one of SSE's shareholders, Frank Trumbower, from approximately 4% to more than 16% of SSE. Because Trumbower also held an interest in First Cellular Limited Partnership (First Cellular) [3], another applicant for the Boone market, there was an apparent violation of Section 22.921(b) of the rules, which prohibits an applicant from holding an interest in more than one application for the same Rural Service Area (RSA), unless the applicant is a publicly traded corporation, in which case it may hold up to 5% in a competing applicant. The MSD was advised that Trumbower orally renounced his interest in First Cellular.

3. The MSD's letter returning CTSI's application found that Trumbower had failed to memorialize his renunciation in the second application, which preserved his interest and, thus, constituted a violation of Section 22.921(b) of the rules. The MSD also found that the Pritchard trust was ineffective in insulating SSE from CTSI because Pritchard had remained SSE's major shareholder and the chairman of SSE's board of directors. In addition, Pritchard admitted to the Commission that he believed that he was obligated to transfer CTSI's interest in the Boone RSA application back to SSE's new shareholders, suggesting that SSE's new majority shareholders could exert substantial influence over CTSI. Even if the trust were effective, the MSD noted, the Commission's "one to a market" requirement of Section 22.921(b) of the rules would be violated. The MSD reminded SSE that, with the exception of the "less than 5%" allowance afforded publicly traded corporations, Section 22.921(b) prohibits any cross-ownership between mutually exclusive applications. In any event, Trumbower remained the owner of approximately 4% of CTSI, and the trust was not a publicly traded corporation after CTSI was transferred to the trust. Trumbower's interest therefore violated Section 22.921(b). CTSI disputes the validity of each of the MSD's conclusions. In addition, CTSI has now withdrawn its earlier plan for reconveying its stock from the trustee to SSE's new shareholders.

III. DISCUSSION

4. CTSI contends that the MSD erred in ruling that Trumbower's allegedly "impermissible" interest in two Boone RSA applications violated Section 22.921(b). It submits that in order for this rule section to apply the alleged cross-owner must have impermissible ownership interests in at least two mutually exclusive applications. While admitting that Trumbower did in fact hold an interest in another application for the Boone market, CTSI claims as a matter of law that his interest in SSE, which is a publicly-held corporation, has never represented an ownership interest in CTSI. Before SSE's stock placement Trumbower's holdings were below the 5% recognition threshold, and CTSI avers that is where they remained after the placement, because the trust instrument specifically prohibits all new shareholders, including Trumbower, from having any interest whatsoever in the CTSI stock owned and held by the trustee. In other words, the newly placed shares carried with them no recognizable beneficial interest in CTSI.

5. CTSI contends next that the MSD erred in its determination that the trust was ineffective in insulating CTSI from SSE. It alleges that the MSD's finding that Pritchard's stature as a shareholder and top official of SSE would enable the new SSE shareholders to exert influence over CTSI is contrary to both logic and common sense. Pritchard's stock ownership and board chairmanship, claims CTSI, place the new shareholders in a weak position vis-a-vis the affairs and policies of CTSI. Equally misplaced, says CTSI, was the MSD's perception of Pritchard's belief that he was obligated to reconvey the CTSI stock he holds in trust to the new shareholders. CTSI points out that a trustee's actions are guided and influenced by the trust instrument. In this regard, it asserts, Section 5(a) of the trust agreement prohibits the trustee from reconveying the CTSI stock without prior Commission approval. Therefore, avers CTSI, Pritchard's perception, if any, that he is obligated to retransfer the stock is immaterial. Moreover, concludes CTSI, Pritchard has since decided that the best interests of the trust's beneficiaries would not be served by returning CTSI's

stock to SSE. This decision to terminate any retransfer efforts, claims CTSI, provides compelling proof of its and the trustee's independence.

6. The record shows that SSE's decision to raise capital through the placement of additional stock created a potential violation of the Commission's cross-ownership restrictions and the resulting imperilment of CTSI's application. As noted earlier, one of SSE's shareholders, Trumbower, already held a cognizable interest in another application for the Boone RSA. His other interest did not pose a problem initially, however. Since Trumbower's holdings in SSE constituted less than 5% of its then issued and outstanding stock, his derivative interest in CTSI, which was equal to his holdings in SSE, was not cognizable for the purposes of the cross-ownership prohibition. 47 C.F.R. § 22.921(b). The situation changed, however, when SSE placed the additional stock. Trumbower's derivative interest in CTSI increased beyond the permissible 5% and thus became cognizable. Consequently, in order to avoid violation of the Commission's rules, CTSI had to demonstrate that Trumbower had divested himself of his interest in the other application,[4] or, alternatively, establish a means whereby Trumbower's new interest in CTSI would not be attributable for the purpose of a cross-ownership assessment. Although CTSI sought to do both, neither attempt was successful.

7. Trumbower's purported renunciation of his interest in the competing applicant was patently inadequate. Despite the MSD's request for documentation verifying his claimed renunciation, CTSI failed to present evidence that a binding formal notification to the applicant was ever made. Nor has CTSI even attempted to argue that Trumbower's oral renunciation was enforceable.[5]

8. The attempt to avoid violating Section 22.921(b) by separating CTSI from SSE's new shareholders through the use of a trust was also ineffective. The Commission has recognized in the broadcast context that "trusts are occasionally established specifically to effect compliance with the Commission's rules for holdings which would violate the rules if held outright."[6] However, in noting the possibility for abuse that such arrangements present, the Commission also has stated that it would examine each trust on a case-by-case basis in order to determine if the trust provisions adequately insulate the trustee from the beneficiary or grantor of the trust.[7] In specifying the criteria by which it would make this determination, the Commission has stated, *inter alia*, that the trustee must be an independent person with no familial or business relationship with the beneficiary or grantor.[8]

9. We believe these criteria are appropriately used as a framework in analyzing compliance with the cellular cross-ownership rules.[9] When examined in light of the non familial or business relationship criterion, the trust agreement created by SSE fails to establish the necessary insulation between the trustee and the shareholders of SSE. This is so because Pritchard, the trustee, retained a dominant presence in SSE. The MSD was advised by CTSI, in the aforementioned April 17th submission, that Pritchard was SSE's largest single shareholder (48%), its chief operating officer, and the chairman of its board of directors. CTSI also advised the MSD at that time that Pritchard's stock ownership and leadership role in SSE provided him with de facto control of the corporation. A meaningful separation of CTSI from SSE, therefore, was not even attempted, let alone achieved.

10. An examination of the record further supports the conclusion that the trust did not achieve the required insulation between SSE and CTSI. Despite the fact that the provisions of the trust instrument forbid the reconveyance of CTSI stock to SSE's new shareholders, absent prior Commission approval, it is uncontroverted that Pritchard stated his intent to effect such a reconveyance. The MSD properly interpreted this statement as a predisposition not to comply with the insulation provisions of the trust, and while perhaps not determinative, Pritchard's statements did confirm the MSD's conclusion that his apparent conflict of interest vitiated the effectiveness of the trust.[10]

11. Presented with all of the foregoing facts, the MSD was correct that CTSI did not comply with the Commission's cross-ownership restrictions. We, therefore, find that the MSD's decision that the trust did not sufficiently insulate CTSI from SSE and that Trumbower's presence consequently violated Section 22.291(b) of the rules was correct.[11]

12. We also concur with the MSD's determination that even if it were assumed that the trust were effective in insulating CTSI from SSE's new majority shareholders, the Commission's "one to a market" requirement of Section 22.921(b) would still be violated. No attempt was made to establish that Trumbower's interest in CTSI was not attributable for cross-ownership purposes. CTSI has mistakenly assumed that it remained a "publicly-traded" corporation within the meaning of Section 22.921(b)(2) after the trust was created. CTSI was a privately controlled corporation. Its shares are neither widely-held nor publicly-traded, and they are not available on the open market. All of CTSI's stock is held for the benefit of SSE's "old shareholders". Its ownership is restricted to this group. CTSI, therefore, lies outside the purview of the 5% exemption from the Commission's cross-ownership restriction.

IV. ORDERING CLAUSE

13. WHEREFORE, IT IS HEREBY ORDERED THAT the Petition for Reconsideration filed by Corporate Telecom Services, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Letter from Chief, MSD to Henry A. Solomon, Esquire (dated May 2, 1990), which addressed a petition for waiver and cut-off exemption filed July 7, 1989 and two attendent letters filed January 19, 1990 and April 17, 1990.

[2] SSE indicates that the recapitalization was effected in order to please creditors and to keep SSE solvent.

[3] Trumbower is First Cellular's sole general partner with a 17% equity interest, and is a limited partner with a 16.6% equity interest.

[4] Section 22.922 of the rules prohibits any transfer of a cellular application seeking to provide service to a RSA. Therefore, Trumbower would have been required to request a waiver of this anti-alienation provision. This was not done.

[5] CTSI did proffer a letter from Trumbower to his attorney wherein he advises the attorney that the only documentation of his renunciation of any benefits arising from CTSI's application or the conflicting applications are in a memorandum to his fellow partners in the partnership through which he holds his interest in SSE. This memorandum, dated March 20, 1989, simply states, in part, that he has transferred all of his interest in VSAT Limited Partnership, the entity through which Trumbower's interest in SSE is derived, to his wife. The significance of this submission escapes us. It has nothing to do with Trumbower's alleged renunciation of First Cellular. Furthermore, it is contradicted by the facts that have been presented. One of the critical points of CTSI's case is that Trumbower need not relinquish holdings in SSE because they are being held in trust.

[6] *Attribution of Ownership Interests*, 97 FCC 2d 997, 1023 (1984), *reconsidered in part*, 58 RR 2d 604 (1985), *further reconsidered*, 1 FCC Rcd 802 (1986). *See also Twentieth Holdings Corporation*, 4 FCC Rcd 4052 (1989) (noting that trusts can be legitimately used to avoid applicability of Commission's broadcast multiple-ownership rules).

[7] *Attribution of Ownership Interests*, 97 FCC 2d at 1023-24.

[8] *Id.*, 97 FCC 2d at 1024; *see* 47 C.F.R. § 73.3555, note 2(e) (1990).

[9] *See Communications Industries, Inc.*, Mimeo No. 0770 (Com. Car. Bur.) (released November 8, 1985) (analyzing legitimacy of trust mechanism proposed by a common carrier in light of Commission decisions and critria concerning use of trusts in broadcst context).

[10] It should be noted that because the recapitalization of SSE resulted in a substantial alteration in the ownership of CTSI, the applicant was obligated, pursuant to Section 1.65 of the rules, to notify the Commission of the change in circumstances within 30 days of the occurrence. CTSI, however, did not formally advise the MSD until June 21, 1989, which was over six weeks after CTSI was announced as the lottery winner for the Boone RSA and four months after the change was effected. Although CTSI's violation of Section 1.65 is not decisionally significant, we view it as another indication of CTSI's lack of compliance with the Commission's requirements.

[11] Moreover, Pritchard may not now forswear his prior intent to return CTSI's stock to its former parent. This disavowal, which only appears in CTSI's petition for reconsideration, was not part of the record before the MSD when it reached its decision, and carries little weight now.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-599

In the Matter of

Amendment of Section 73.202(b), RM-7523
Table of Allotments,
FM Broadcast Stations.
(Fort Bragg, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 4, 1991; Released: October 16, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 5 FCC Rcd 7410 (1990), proposing the substitution of Channel 244B for Channel 244A at Fort Bragg, California, and modification of the permit of The Henry Radio Company ("petitioner") for Station KLLK-FM (formerly Station KZPB-FM).[1] Petitioner filed supporting comments in response to the *Notice*. Paradise Broadcasting, Inc., licensee of Station KNVR(FM), Channel 244A, Paradise, California, filed comments and a counterproposal seeking to amend the FM Table of Allotments by changing its community of license from Paradise to Chico, California, and by modifying its authorization to specify operation on Channel 244B1. In order to accommodate its proposal, PBI requests the substitution of Channel 228B in lieu of proposed Channel 244B for Channel 244A at Fort Bragg.[2] PBI filed a request for additional time to file reply comments to which petitioner responded. Petitioner filed additional comments.[3]

2. We believe the public interest would be served by substituting Channel 244B for Channel 244A at Fort Bragg since it could provide an enhanced service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will substitute Channel 244B for Channel 244A at Fort Bragg. As indicated in the *Notice*, Channel 244B can be allotted to Fort Bragg at the petitioner's present site, located 4.5 kilometers (2.8 miles) northeast of the community,[4] in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 2, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Fort Bragg, California	237A, 244B, 253A

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of The Henry Radio Company for Station KLLK-FM IS MODIFIED to specify operation on Channel 244B in lieu of Channel 244A, at Fort Bragg, California, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

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[1] As indicated in the *Notice*, an assignment of the construction permit from Susan I. Waters to The Henry Radio Company was granted October 16, 1990 (BPH-880527MQ), and consummated on November 1, 1990.

[2] PBI's counterproposal is technically and procedurally defective and was not placed on public notice. Initially, we note that in order to accommodate its request, PBI proposed to relocate its transmitter to a site presently used by two existing Chico FM stations. However, the referenced site would place the transmitter for Station KNVR(FM) 25.8 kilometers from Chico. The maximum distance at which we can normally predict compliance with the 70 dBu principal city grade coverage requirement of Section 73.315(b) of the Commission's Rules by a Class B1 station is 23.2 kilometers. Although PBI asserts that two existing FM stations licensed to Chico are located at its suggested site, those stations may have received a waiver of the requirements of Section 73.315(b) in connection with their applications for a construction permit. However, waivers of Rule 73.315(b) are not available to parties in the allotment context. Secondly, we note that PBI neglected to state its intention to apply for Channel 244B1 at Chico, in the event it could be allotted, as required by Commission policy. *See* paragraph 2 of the Appendix to the *Notice*.

Moreover, PBI requested the modification of Station KLLK-FM at Fort Bragg to nonadjacent Channel 228B, without indicating the availability of an additional equivalent channel. Under those circumstances, Station KLLK-FM could not have been modified, as requested, in the event competing expressions of interest were received for Channel 228B. An additional deficiency with PBI's counterproposal results from its failure to provide a technical showing to demonstrate that the requested allotment of Channel 228B at Fort Bragg complies with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules. *See* § 1.401(c) of the Commission's Rules. As the Commission has previously stated, counterproposals must be technically correct and substantially complete when filed. *See Eldorado, OK, et al.*, 5 FCC Rcd 6737 (1990), and cases cited therein. As a result of the technical and procedural deficiencies inherent in PBI's counterproposal, the counterproposal is rejected.

[3] The Commission's Rules do not authorize the filing of pleadings beyond the established comment period. Therefore, the additional comments submitted by PBI and the petitioner have not been accepted for consideration. *See* § 1.415 of the Commission's Rules.

[4] Coordinates at the site specified in the construction permit issued to Station KLLK-FM are 39-27-53 and 123-45-27.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted,** must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, The Henry Radio Company, permittee of Station KLLK-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-559

In re Applications of

HARRISON COUNTY BROADCASTING CO. File No. BPH-860221MT

PRUITT AND OWEN File No. BPH-860218MQ

For Construction Permit
For a New FM Station on Channel 229B
In Corydon, Indiana

Appearances

Robert S. Stone, Esq. on behalf of Harrison County Broadcasting Co.; *Lauren A. Colby, Esq.* on behalf of Pruitt and Owen.

DECISION

Adopted: October 2, 1991; Released: October 17, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Board Member ESBENSEN dissenting with statement.

Board Member BLUMENTHAL:

1. The Board has before it the "Limited" Exceptions and a Reply of Harrison County Broadcasting Co. (Harrison), and the Exceptions and a Reply of Pruitt and Owen (P&O) to the *Initial Decision*, 6 FCC Rcd 1386 (1991) (*I.D.* at [FCC Rcd page]), of Administrative Law Judge John M. Frysiak (ALJ), granting the Construction Permit for a new FM station on Channel 229B in Corydon, Indiana to Harrison. Oral argument was held before the Board on June 28, 1991. We affirm the award to Harrison.

BACKGROUND

2. Two sets of hearings on the standard comparative issue have been conducted, and two initial decisions have been rendered in this proceeding.[1] The second hearing and *I.D.* were required because P&O's application was originally returned as "unacceptable for filing" (for proposing a site short-spaced to the buffer-zone protection afforded under the Commision's then-applicable "buffer zone" separation requirements), but was subsequently reinstated.[2] At the second hearing, Harrison, P&O and another applicant (now dismissed), Corydon Broadcasters, Limited (CBL), participated. Evidence adduced in that hearing resulted in the addition of a financial issue against Harrison, which issue was the subject of a further hearing on July 9, 1990.

3. The second *I.D.*, which resolved the financial issue in Harrison's favor, also awarded the permit to that applicant on standard comparative grounds. *I.D.* at 1390. The ALJ found that Harrison enjoyed a "substantial preference" based on media diversification and a "decisive preference" based on ownership/management integration factors. *Id.* More specifically, Harrison received 100% quantitative integration credit for the proposed full-time integration of its sole shareholder, president and director, Deborah M. Poindexter, whereas P&O received only 49% integration credit, based on the full-time integration proposal of George Owen, a 49% owner of P&O. The ALJ discounted the full-time integration proposal of Lenn R. Pruitt, a 51% owner of P&O, finding his proposal to be "not credible." *Id.* The application of CBL was not considered because, following the hearing but prior to the release of the instant *I.D.*, CBL dismissed with prejudice after the approval of a settlement between it and P&O. *See Memorandum Opinion and Order*, FCC 91M-07, released January 4, 1991.

4. Harrison's "limited" exceptions here decry: (1) the Commission's reinstatement of P&O's application; and (2) the ALJ's ruling that his first *I.D.* was vacated in its entirety, and that a *de novo* hearing was required following the reinstatement of P&O's application. In raising its first exception, Harrison recognizes that the Board lacks authority to modify the Commission's reinstatement of P&O's application, but argues the matter to preserve its appellate rights. Harrison Exceptions at 3. Thus, the Board need not comment further on this matter. As to Harrison's second exception, the Board concludes that it is without merit. In his first *I.D.*, the ALJ considered the comparative proposals of only *two* of the three mutually exclusive applicants (*see supra* note 1). Under those circumstances, a *de novo* consolidated hearing was ordered at which all three parties would have the opportunity to adduce evidence regarding one another; and, in turn, the ALJ would have the opportunity to compare simultaneously all three applicants. *See generally Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

5. For its part, P&O excepts: (1) to the ALJ's refusal to enlarge issues to determine whether Deborah M. Poindexter was the "real party-in-interest" in the Harrison application; (2) to the ALJ's refusal to enlarge issues to determine whether "a local attorney in Tennessee," not Poindexter, is the "real party-in-interest" in the Harrison application; (3) to the ALJ's holding that Harrison's original bank loan commitment was not a mere "accommodation" and that, therefore, Harrison was entitled to later amend its application to substitute new financing; (4) to the ALJ's determination that Harrison's new financial commitment was not also a mere "accommodation"; and (5) to the ALJ's refusal to add site availability, Section 1.65 and misrepresentation issues against Harrison, and for allowing Harrison to amend to specify a different transmitter site. P&O did not except to the ALJ's disposition of the standard comparative issue.

REAL-PARTY-IN-INTEREST

6. P&O's first two exceptions relating to the ALJ's refusal to add real-party-in-interest issues are rejected. P&O several times sought issues against Harrison in this proceeding on real-party-in-interest grounds. *See* P&O Motion To Enlarge Issue, filed February 9, 1990; P&O Further Motion to Enlarge Issues, filed July 23, 1990. The

ALJ declined to do so. *See Memorandum Opinion and Order*, FCC 90M-690, released April 3, 1990; *Memorandum Opinion and Order*, FCC 90M-2647, released August 23, 1990. The ALJ rejected P&O's first request, concluding that there was "no foundation for an undisclosed interest issue. The charge rests on rank speculation . . . Pruitt's allegations amount to no more tha[n] fly specking." *Memorandum Opinion and Order*, FCC 90M-690 at para. 8. The second time the ALJ rejected P&O's request, he further elaborated:

> P&O frankly admits that it can do no more than to *suggest* that the undisclosed real-party-in-interest is Creed Daniel, Harrison's local counsel. P&O has not offered any evidence that Creed Daniel has an actual undisclosed ownership interest or will be in a position actually or potentially to control the operation of the facility. There is no evidence that Creed Daniel owns any stock in Harrison. There is no factual information which would raise a question as to whether Creed Daniel will actually or potentially exercise voting control. The undisclosed real-party-in-interest issue is not warranted. P&O's request is based on mere speculation.

Memorandum Opinion and Order, FCC 90M-2647 at para. 5 (emphasis supplied).

7. We must agree with the ALJ. We find the following passage from P&O's winter 1990 pleading to be characteristic of the lack of hard factual support for P&O's request for this issue:

> *She had to have received help from somebody* and, in this instance, an attorney/client relationship between Daniel and [bank president William] Lewis serves to explain why the bank issued the letter. It strains credulity to believe that Daniel intervened with his friend and client Lewis just as a favor to Deborah Poindexter: *there had to be a direct benefit flowing to Daniel from the issuance of that [bank] letter.*

Reply To Opposition To Motion To Enlarge Issues, filed March 19, 1990, at 16-17 (emphasis supplied). To speculate that something "has to have happened" is not enough; the law requires that there be a factual showing, adequately supported, that raises a substantial and material question. *See Colonial Communications, Inc.*, 6 FCC Rcd 2296 (1991)(and cases cited therein). The Board finds that, so far as this record shows, the ALJ did not err in refusing to add a real-party issue as to Poindexter and/or her local attorney, based upon little more than the speculation of her opposition.

FINANCIAL QUALIFICATIONS

8. The circumstances leading to the addition of a financial issue against Harrison were as follows. When Harrison filed its application, it certified tht it had "reasonable assurance" of financing. The basis for the certification was a loan commitment letter dated January 10, 1986 from Citizens Bank, New Tazewell, Tennessee, in the amount of $250,000. Harrison's sole shareholder, Deborah M. Poindexter, had obtained the letter from William C. Lewis, the bank's president. That letter specified the loan amount, the specific use of the proceeds, the interest rate, repayment terms, collateral requirements, and conditions for final approval. *I. D.* at 1387. That letter, it is represented, was the product of a meeting between Poindexter and Lewis in early January 1986. The reported circumstances of that meeting were as follows:

> When Ms. Poindexter met with Mr. Lewis in early January, 1986, she discussed her plans for the station, and described the market involved, as well as studio and other equipment costs. She had with her a rough draft of her plan as well as a specimen loan commitment letter which her attorney had previously given her.
>
> During their meeting Mr. Lewis asked Ms. Poindexter about her personal financial condition and her credit history. Ms. Poindexter did not have a balance sheet with her. Ms. Poindexter advised Mr. Lewis that she felt she had sufficient funds to prosecute the application for the radio station, that her liabilities were minimal, and that while her personal assets were not substantial, her credit history was favorable.

Id., at 1386 (transcript citations omitted). At the time that the 1986 letter was prepared, Lewis claimed to be "under 'somewhat of a mandate' to expand the bank's loan portfolio, given criticism by the bank's board of directors" *Id.* (internal citation omitted).

9. When these circumstances became known as a result of Poindexter's testimony at the hearing sessions held in April 1990 (on the standard comparative issue), P&O filed a Motion To Enlarge Issues against Harrison, arguing that the Citizens Bank letter was a mere "accommodation"; and, accordingly, P&O requested a financial issue. The ALJ did add a financial issue "to determine whether Harrison County Broadcasting Company ha[d] reasonable assurance of the availability of sufficient funds for the construction and operation of its proposed station." *Memorandum Opinion and Order*, FCC 90M-1337, released May 24, 1990.[3]

10. Shortly thereafter, Harrison represented that Poindexter and her communications counsel began preparing a revised business plan for the construction and operation of the radio station, which plan provided for additional equipment and operations beyond the initial three months. It asserts that it presented the revised plan to Citizens Bank at the end of May 1990. On June 18, 1990, Lewis wrote to Poindexter stating that his bank could no longer pursue the project, due to changes in the bank's policy and the increased loan amount requested.

11. Poindexter then contacted two other banks: The Central Trust Company, N.A., Cincinnati, Ohio and First American National Bank in Knoxville, Tennessee. Although First American declined, Central Trust provided a letter of June 21, 1990, relating to a potential loan for $500,000. More specifically:

> Ms. Poindexter spoke with John Thomas, Assistant Vice President for the [Central Trust] bank by telephone and expressed her desire for financing the project. Mr. Thomas agreed to review Harrison's business plan, which was forwarded to him by counsel for Harrison. Mr. Thomas then asked for and received a balance sheet from Harrison and Ms. Poindexter's personal financial statement. These

> documents were furnished to Mr. Thomas by counsel for Harrison on June 18, 1990. Ms. Poindexter's personal financial statement was prepared by her personally on a form obtained from Third National Bank in Knoxville, Tennessee and was signed and dated by her before it was sent by counsel for Harrison to Mr. Thomas.

I.D. at 1387 (transcript citations omitted). Like the earlier Citizens Bank letter, the Central Trust letter identified the borrower, the loan amount, how the proceeds would be used, the interest rate, the terms of repayment, the collateral and conditions for final approval of the loan. The *I.D.* concluded that Harrison was financially qualified, finding that both bank letters relied upon by Harrison were sufficient to meet the Commission's financial standard.

12. *Citizens Bank Letter.* The ALJ found that the 1986 bank commitment letter from Citizens Bank was not a mere "accommodation," such that Harrison was not financially qualified when it filed its original application. *Compare, e.g., Shawn Phalen*, 5 FCC Rcd 2622 (Rev. Bd. 1990)(bank letter questioned where evidence reflected that applicant provided bank with no data on herself or her broadcast project). In so holding, the ALJ applied the traditional standards rehearsed by this Board in *Scioto Broadcasters, Limited Partnership*, 5 FCC Rcd 5158, 5160 (Rev Bd. 1990), *review denied*, 6 FCC Rcd 1893 (1991), *recon. dismissed*, 6 FCC Rcd 4626 (1991). The ALJ here stated in relevant part:

> Ms. Poindexter did furnish to Mr. Lewis all of the information on which she based her financial qualifications. When she met with Mr. Lewis she discussed her business plan. She had with her a rough outline she had prepared when developing cost estimates. She provided Mr. Lewis with the cost estimates and discussed her personal financial conditions as to her assets and credit history. She indicated that she had sufficient funds to prosecute Harrison's application for the radio station. It is true that Ms. Poindexter supplied her financial history orally and that it would have been neater had Mr. Lewis appraised written materials. However, the fact that the financial presentation was oral does not belie Ms. Poindexter's credit worthiness. Mr. Lewis was acquainted with Ms. Poindexter and had ample opportunity to assess her position.

I.D. at 1389. The ALJ dismissed P&O's suggestion that the financial stability of Poindexter was so marginal that no bank would likely commit funds, pointing out that Citizens Bank did, in fact, issue a facially valid loan commitment letter. *Id.* Lewis was also deposed; and, accordingly, P&O had the opportunity to elicit testimony as to the letter's underlying efficacy. The ALJ fully considered P&O's assertions, but concluded that none of the testimony controverted the face of the letter. *Id.*

13. In its exceptions, P&O again asserts that Harrison's Citizens Bank letter was but a mere "accomodation." It argues that the letter was disingenuous because "the bank did not have a 'long and established relationship' with Ms. Poindexter, 'sufficient to infer that the lender is thoroughly familiar with the borrower's assets credit history, current business plan and similar data' [and] . . . Ms. Poindexter had not provided the bank with 'such data' and . . . the 'oral presentation' made by Ms. Poindexter to Mr. Lewis was wholly inadequate to satisfy the *Scioto* standard." P&O Exceptions at 43-44. P&O further maintains that additional proof that the Citizens Bank letter was merely an "accomodation" exists in the fact that "when the letter was challenged it was withdrawn." *Id.*

14. We are constrained to affirm the ALJ on the evidence of record. As we reiterated in *Scioto Broadcasters*, when determining whether an applicant has "reasonable assurance" of "committed sources of funds," we consider:

> whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms).

5 FCC Rcd at 5160.[4] The record in this case shows that the "individual qualifications" of Harrison were purportedly reviewed by the bank's president; "adequate collateral" was apparently demonstrated to the bank; and the "tentative terms of the loan" were identified and "are satisfactory to both borrower and lender." *Id.* Unlike the situation in *Shawn Phelan*,[5] the issue *was* added and tried by this ALJ, and the bank's president was thoroughly questioned by P&O counsel.[6] Although we might understand P&O's skepticism at Lewis' sworn sincerity in contemplating a $250,000 loan to Harrison, and make no judgment as to the prudence of his own banking practices, the record evidence appears to be insufficient for us to legally conclude that the Citizens Bank loan letter was purely an "accommodation," and nothing more.

15. *Central Trust Letter.* The *I.D.* also held that the Central Trust proposal, upon which Harrison has relied from June 1990 to the present, was adequate. The ALJ found that Central Trust "had before it all information about Poindexter individually and Harrison's proposed operation necessary to satisfy the Commission's standard ... [as well as] the tentative terms of the potential loan." *I.D.* at 1389. He concluded "that Central Trust has a present firm intent to make the loan, subject to future review." *Id.* (citations omitted). Although P&O has objected to language in the Central Trust letter regarding collateral, the *I.D.* found no critical deficiency in that respect. The ALJ observed that Central Trust requires "a first lien security interest in assets used in the operation of the station and 100% of the outstanding shares of the corporate stock 'or (in lieu thereof) other collateral satisfactory to the bank together with personal guarantees.'" *Id.* (quoting Central Trust letter). Further, the ALJ held that the letter's "reference to personal guarantors refers to those who might post 'other collateral,' and does not apply to the situation when a first lien security interest in the assets used in the operation of the station is granted." *Id.*

16. Still, P&O contends that the Central Trust letter contains " a host of conditions, loopholes and 'outs'," thus leaving "open the possibility or probability that the bank would require other and different collateral to be posted," and that Harrison possesses no such collateral to post. P&O Exceptions at 46. It further contends that the ALJ "was able to rationalize his reliance on the Central Trust letter, only by blatantly misquoting the letter." *Id.*, at 48-49. P&O maintains that Central Trust included other "conditions," and deviated from the specimen letter originally prepared by Harrison because the financial information provided by Harrison "showed, on its face, that neither [Harrison] nor Ms. Poindexter possessed assets sufficient to support a $500,000 loan." *Id.*, at 48. In support of its position, P&O relies upon *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945 7947 (Rev. Bd. 1989), *recon. denied*, 5 FCC Rcd 322 (1990), *review denied*, 5 FCC Rcd 5751 (1990), *recon. dismissed*, FCC 90-409, released December 12, 1990, where we found that an applicant was financially unqualified because it relied upon nothing more in fact than an "invitation" to someday apply for a loan.

17. The specific language in question (*i.e.*, "or other collateral satisfactory to the bank together with personal guarantees"), standing alone, might be problematic. But, that particular passage follows previous language stating that the bank could also rely on the physical assets of the proposed station, as well as on shares in the licensee corporation. The fact that Central Trust did not adopt wholesale the specific language provided by Harrison in its draft is not critical, so long as the terms of the proposed loan (*i.e.*, payment period, interest rate, collateral requirements, and other basic terms) are specifically identified and are satisfactory to lender and borrower. *See Scioto Broadcasters, supra.*

18. P&O's direct reliance on *Marlin* is misplaced. There, and most significantly, the subject letter had completely failed to reference an interest rate, collateral, or guarantee requirements. More importantly, the bank there specifically requested that the applicant forward the applicant's financial statements, but that was never done. No such infirmities appear to becripple Harrison's present claim to "reasonable assurance," and, overall, the *I.D.* must be affirmed on the financial issue.

SITE CERTIFICATION

19. When Harrison originally filed its application on February 21, 1986, it specified a transmitter site located off "Heidelberg Church Road, 3.4 miles SW of Corydon," having geographic coordinates of 38^0 11' 05" north latitude; 86^0 10' 43" west longitude. Harrison Application, Section V-G, Harrison there indicated that it had obtained "reasonable assurance" from Dr. James McClintock, president of Wyandotte Corporation, for its transmitter site. However, the *Hearing Designation Order*, 2 FCC Rcd 7521 (1987), observed that while Harrison (and CBL, now dismissed) claimed to have "reasonable assurance" of their sites, the Commission had received "informal objections" to the Harrison (and the CBL) application(s) from an organization styled Media Fairness Committee (MFC), alleging "that the site certifications filed by [CBL] and Harrison are not valid, . . . that the actual land owners of the proposed sites did not grant permission to either [CBL] or Harrison for the land owners' property to be used for an antenna site [and] that the owners cited in the respective applicant's affidavits are not the actual owners of the land where the projected radio towers will be built." *Id.*, at 7523. Because, as required under Section 309(d)(1) of the Communications Act, MFC did not support its allegations with the affidavit of a knowledgeable person, its allegations were treated merely as "informal objections." *See* 2 FCC Rcd at 7523. In essence, and:

> on November 18, 1986, MFC wrote to the Commission: "Our committee can provide irrefutable proof of these applicants [CBL and Harrison] not having any site agreements with the land owners at the time of filing." MFC, however, has failed to provide any affidavits from the alleged "actual" land owners. Without any form of proof other than bare allegations, the Commission has nothing to act upon and, as such, no issue will be specified for hearing. Accordingly, MFC's informal objection will be denied.

Id. No transmitter site issue was added against Harrison (or CBL).

20. Despite the fact that no site issue was formally designated against it in December 1987, Harrison nonetheless filed a petition to amend its application in which it asserted: (1) that it had duly obtained "reasonable assurance" of its site from McClintock; but (2) "so as to remove all doubt as to the access Harrison in fact timely acquired for use of McClintock property as a transmitter site, Harrison has promptly prepared the amended engineering proposal proffered herewith." Harrison Motion For Leave To Amend, filed February 1, 1988, at 3. However, the amendment, as more fully discussed below, specified different geographic coordinates than those specified in Harrison's original application.

21. Harrison's site amendment, with its attendant change in coordinates, was vigorously challenged at that time by CBL. Thus, on February 3, 1988, CBL filed a Petition To Enlarge Issues seeking site availability, Section 1.65, as well as misrepresentation/lack of candor issues against Harrison's amendment petition. As outlined in P&O's instant exceptions, CBL had there claimed that: (1) Harrison's original site was in fact located on property owned by Chester B. Stem, Inc., not on property owned by McClintock's Wyandotte Corporation, as originally represented in Harrison's application; (2) Harrison's Poindexter had written a letter to Chester B. Stem, Inc. in July 1986 seeking use of the site property; (3) Harrison's counsel, Robert S. Stone, had also written a letter on September 5, 1986 to the McClintocks seeking to "confirm that the location on the attached map" was actually on McClintock property, and was advised by return letter of September 10, 1986 that the site Harrison had specified did not belong to the McClintock family; and (4) that Harrison subsequently took no action to either correct the representations contained in its Certificate of *See* P&O Exceptions at 8-10.

22. In response, Harrison represented to the ALJ as follows:

> (1) Harrison's consulting engineer [Kenneth Larkin] timely contacted the individuals who themselves claimed to be the owners of the site selected by the engineer and who gave their consent to the engineer as to the availability of the property *prior to* the preparation and filing of Harrison's application.

> (2) Uncertainty as to the boundaries of the land owned by the above individuals resulting from counsel's informal inquiries at the local courthouse prompted both the applicant and its counsel to seek to confirm from the above individuals where their property boundaries lay.
>
> (3) The applicant and its counsel concurrently sought *and obtained* access to the site originally specified in Harrison's application from the adjoining property owner, in the event that the site belonged to the adjoining property owner.
>
> (4) Despite the efforts of the applicant and its counsel, Harrison was never advised by the landowners originally contacted (Dr. James A. McClintock, his wife, Ruth McClintock, or his son, William McClintock) where the McClintock property line was located, or, more importantly, that wherever such boundaries lay, the McClintock property would not be available to Harrison for a transmitter site.
>
> (5) Following designation of its application for hearing, and upon confirming that competing applicant CBL's transmitter site was definitely on McClintock property, Harrison chose to amend its application so as to specify with absolute certainty property owned by the McClintocks, which would be consistent with its original intention.
>
> (6) Notwithstanding the efforts of others to usurp Harrison's access to its proposed transmitter site, it has always had reasonable assurance of access thereto.

Harrison Opposition To Petition To Enlarge, filed February 18, 1988, at 2-3. That pleading was attended by statements and/or letters from Poindexter,[7] Harrison's counsel,[8] Harrison's consulting engineer, [9] and a declaration from Dr. James McClintock[10] explaining the chronology of events. The Mass Media Bureau supported Harrison's amendment petition, which the ALJ allowed after considering the pleadings and evidence before him. *Memorandum Opinion and Order*, FCC 88M-624, released March 7, 1988. Nevertheless, CBL renewed its effort to obtain a site issue against Harrison late that autumn when it filed, on September 18, 1988, a Petition to Reopen the Record and Enlarge the Issues, reasserting that Harrison had misrepresented the facts surrounding its site amendment. CBL claimed that 1986 correspondence had revealed that Harrison was aware, very early on, that it had specified land owned by Stem, not the McClintocks, and that Harrison's assertion that it was not entirely certain about the land ownership was belied by a July 7, 1986 letter from Poindexter to Stem seeking assent to use the latter's land.

23. In its response to CBL's charges, Harrison again maintained that because it was not perfectly clear that the land within the boundaries on which its specified transmitter site was located did belong (in whole or in part) to the McClintocks, Poindexter *also* approached Stem (the adjoining landowner) in July 1986 to secure Stem's authorization as well, in the event that the site (in whole or in part) belonged to Stem. Harrison represented to the ALJ that:

> Contrary to [CBL's] speculative claims, Deborah Poindexter stated unequivocally that she and her attorney contacted the owner of property adjoining the property of individuals previously contacted in order to secure access to the adjoining property owner in the event that the site was in fact located there (see Declaration of Deborah Poindexter dated February 17, 1988 at Para. 4). The record also clearly reflects that permission from the adjoining landowner was ultimately obtained. CBL attempts to convert Harrison's approach in this regard to conduct lacking in candor before this Commission. As explained by Ms. Poindexter in the attached declaration, she simply approached the adjoining landowner for the purpose of obtaining access to his property (in the event her proposed site was indeed located there, a fact far from settled at that time) without taking the adjoining landowner into her confidence. As CBL's own counsel would agree, the adjoining landowner's responses were themselves rather cagy in terms of the location of the owner's property boundaries and the company's willingness to enter into a lease with Harrison. Of course, as noted earlier, over the course of three months in the summer of 1986, and following an exchange of correspondence among Ms. Poindexter, the undersigned, and Richard K. Stem of Chester B. Stem, Incorporated, the landowner provided its permission.

Harrison Opposition To Reopen Record, filed September 27, 1988, at 6. Its pleading was supported by a Poindexter's declaration and a letter of August 22, 1986 from Harrison counsel to Stem reiterating Stem's understanding with Poindexter as to the land.[11] Based on this material, the ALJ denied CBL's Petition to Reopen, stating that:

> [CBL's] assertions are argumentative and without foundation. Ms. Poindexter stated in her February 17, 1988 Declaration that she and her attorney contacted the owner of the property adjoining the property of individuals previously contacted in order to secure access to the adjoining property owner in the event that the site was in fact located there. This assertion does not negate that at the time it was unsettled as to who was the actual owner. Further, it is evident that although there was concern over restrictions over the Stem property, such restriction would have affected the overall area in the region including the McClintock property.

Memorandum Opinion and Order, FCC 88M-3616, released October 28, 1988.

24. Although P&O was not a party to this proceeding at the time CBL attacked Harrison's "reasonable assurance" of its transmitter site, its exceptions before us now piggyback CBL's prior assault and urge that the ALJ erred in failing to add appropriate issues based on CBL's previous claims. In sum, P&O argues that Harrison knew:

> as early as July 1986, precisely where its site was located and that the property in question was owned by Chester B. Stem, Inc. However, [Harrison] did not report this fact or take any corrective action

> until February 1, 1988, nearly 17 months after the date of McClintock's letter and 19 months after the Poindexter letter to Stem concerning the use of the Stem property.

P&O Exceptions at 10. Harrison rejoins to the Board that P&O, like CBL before it, has omitted "critical information" and, further, that Harrison's earlier-filed pleadings confirm "that Harrison had not concealed any information whatsoever in connection with its intended transmitter site, especially its ongoing access thereto [and] that Harrison did not lack diligence in seeking to verify its ongoing access to its intended transmitter site." Harrison Reply at 2. Harrison reiterates that precise identification of the McClintock property boundaries was made particularly difficult because of the failure of the McClintock family to respond to Harrison's initial inquiries. Harrison submits:

> In that regard, while several months did elapse between Harrison's most recent letter to the McClintocks and designation of Harrison's and CBL's applications for hearing, during that time Harrison justifiably believed that, should the McClintocks report that Harrison's site was *in fact* on the adjoining property, Harrision would be immediately able to either relocate to the McClintock property or, in the alternative, confirm ongoing availability of the adjoining property . . . . The hearing designation order reported, for the first time, the receipt by the Commission of an informal objection against *both* CBL and Harrison, claiming that neither had obtained access to property owned by the McClintocks. The undersigned counsel for Harrison, unaware that such an informal objection had been filed with the Commission, immediately contacted counsel for CBL, who advised that, while CBL had also been unaware of the informal objection, CBL was aware that Harrison's proposed transmitter site was located on adjoining property. At that point, Harrison promptly prepared a corrective amendment to its application, which was received by the Commission on Monday, February 1, 1988, twenty-eight (28) days following publication of the hearing designation order in the *Federal Register*.

Id., at 3-4.

25. Our review of the record does not persuade us that the ALJ erred in accepting Harrison's site amendment or in declining to add truthfulness issues, though we do warrant that Harrison's actions with respect to its site have placed it in the defensive position it has found itself. The two discrete questions raised by the P&O exceptions, while interrelated here from a decisional aspect, are: first, whether Harrison intentionally concealed from the Commission the fact that it had misspecified is original transmitter site location; and, second, whether it exercised "due diligence" in amending its application to cure a defect.

26. By its own admission, Harrison did experience uncertainty in the summer of 1986 that it had definitively achieved "reasonable assurance" of its site by virtue of its engineer's exchange with Dr. McClintock. It claims, however, that its compunctions were confined to whether Stem, rather than McClintock, owned (in whole or part) the property under the site specified in its application. Instead of taking the most positive measures to pinpoint the site and the site's ownership at the very onset of irresolution, Harrison chose the expedient of securing alternative authorization from Stem, in the event that Stem had a proprietary interest in the land. Without suggesting that Harrison's manner of assuaging its initial uncertainty was most appropriate, something we discuss again below in connection with "due diligence," we cannot find that a factual question remains to be tried or that the evidence strongly suggests malign concealment on the part of Harrison. Neither P&O, nor CBL before it, has shown that Harrison did not earnestly believe that by acquiring land use authorization from *both* McClintock and Stem it had adequately secured "reasonable assurance" of the site it had intended. Bearing in mind that the Commission's "reasonable assurance" standard has recently been described as "a liberal one," *Elijah Broadcasting Corp.*, 5 FCC Rcd 5350, 5351 (1990),[12] which apparently permits an applicant to legitimately claim a transmitter site based upon a telephonic discussion between an applicant's agent and a landowner, *see id.* (citing *National Innovative Programming Network*, 2 FCC Rcd 5641 (1987)), we cannot say that the evidence here reflects that Harrison was attempting to conceal that it had not rightfully certified to "reasonable assurance" of its original site. Even where it has later developed that an applicant turns out to have been grossly mistaken as to whether it had a solid site arrangement with a landowner, the Commission does not necessarily infer untruthfulness in the initial certification, *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331(1991), nor do we necessarily infer concealment where geographic coordinates must be amended to conform to a site owned by the landowner originally consulted. *See Cannon Communications Corp.*, 5 FCC Rcd 2695 (Rev. Bd. 1990)(subsequent history omitted; Board decision not appealed on site and concealment issues).[13] The facts before us do not undermine the view of the ALJ that Harrison did not intentionally conceal a matter of decisional significance.[14]

27. Beyond the question of whether Harrison ought to have fully reported its misgivings as to its site in the face of its initial compunctions, is the consequent question of whether Harrison demonstrated "due diligence" in seeking to amend its geographic coordinates. Under well-established precedent, "due diligence" runs "from the time the applicant is, or should have been, apprised of the problem requiring amendment." *Brownfield Broadcasting Corp.*, 88 FCC 2d 1054, 1058 (1988). As we perceive the facts, unrefuted in virtually all core respects, while Harrison did harbor an uncertainty as to the ownership of the land it had originally plotted, it was not until the publication of the *Hearing Designation Order* in December 1987, reporting questions as to Harrison's (and CBL's) site(s), that Harrison: (1) discovered that it's engineering consultant (Larkin) had plotted coordinates outside the actual boundaries of the McClintock property; and (2) amended its coordinates to land definitely established to be on McClintock property.

28. Applying the *Brownfield Broadcasting* standard, the question of whether Harrison exercised "due diligence" in amending its application does seem closer to the Board than it appears to have to the ALJ. Harrison admittedly faced uncertainty as to the precision of the locus of its site shortly after filing its application. Rather than alleviating that uncertainty by better survey at that time, which survey would have revealed both the true ownership and

the accurate coordinates of the McClintock property, Harrison merely sought access (*ex abundanti cautela*, it swears) to the adjoining Stem property. Given that fact that both the FCC and the FAA, for their respective regulatory purposes, must process these applications based upon rather precise geographic coordinates, we believe that more care might have been taken earlier by Harrison to ensure the precision of both the ownership and the actual coordinates of its site. We have no desire to condone or encourage carelessness in this important regard. Yet, as we ourselves noted in our review in *Cannon Communications Corp.*, *supra*, the late modification of geographic coordinates by a broadcast applicant has been described by the Commission itself as "entirely routine." 5 FCC Rcd at 2695. Unlike *Cannon*, where the revision of geographic coordinates occurred not only after the hearing and the lower review process, but after the Commission's own *award* of the construction permit, Harrison amended here prior even to hearing. In fact, so similar are certain facts here to those in *Cannon* (applicant alleged to have misrepresented "reasonable assurance" when much later seeking to amend coordinates), we cannot say that Harrison here lacked legal "diligence" in failing to discover that its coordinates were misplotted *prior to hearing designation*, on the facts as we are shown them in this particular case. Since Harrison does not fail the *Erwin O'Conner* "good cause" test[15] on its other elements, [16] the ALJ's acceptance of the site amendment will not now be overturned.

CONCLUSION

29. Because we must find that the ALJ did not err in applying the Commission's extant "reasonable assurance" standards as to finances or transmitter sites, or the standards applicable to Harrison's postdesignation revisions, we cannot declare Harrison to be basically unqualified. Inasmuch as P&O does not except to the ALJ's conclusion under the standard comparative issue, the *I.D.* will not be modified in its ultimate award to Harrison.

30. ACCORDINGLY, IT IS ORDERED, That the application of Harrison County Broadcasting Co. (File No. BPH-860221MT) for authority to construct a new FM station in Corydon, Indiana IS GRANTED; and the application of Pruitt and Owen (File No. BPH-860218MQ) IS DENIED.

31. IT IS FURTHER ORDERED, That the P&O Petition For Leave To Amend filed August 1, 1991 IS GRANTED and the amendment IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The first *Initial Decision* is reported at 4 FCC Rcd 1537 (1989), but has been vacated by the ALJ.

[2] *See Special Markets Media, Inc.*, 4 FCC Rcd 5753 (1989) and *Corydon Broadcasters Limited*, 4 FCC Rcd 8452 (Rev. Bd. 1989).

[3] P&O also sought a concomitant misrepresentation issue, but the ALJ declined to add it "since Ms. Poindexter had a bank commitment letter and there was no showing that she either knew or believed that it was inadequate." *I.D.* at 1386, citing to *Memorandum Opinion and Order*, FCC 90M-1337, released May 24, 1990.

[4] The *Scioto* Board went on to say:

> In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual" qualifications" of the borrower have been preliminarily reviewed, *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio*, *supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.

[5] The Board's action in *Shawn Phalen* was merely a remand to garner information from the applicant (and/or bank officials) as to the financial data exchanged (if any), because the ALJ had there declined to add a financial issue. (Indeed, the testimony of the bank officials given subsequent to our *Phalen* remand swore that the subject applicant's letter *was* but an empty "accommodation," *see* 5 FCC Rcd 2622, 2623 n.2, and the subject applicant then withdrew from the case before the financial issue was tried.)

[6] It bears noting that Lewis was not only the president of Citizens Bank, but a member of the family that owned the bank; and he claimed to have known Poindexter personally for a number of years. *See* Tr. 5-9.

[7] In part, Poindexter's February 1988 Declaration stated:

> In January 1986, I retained Rudolph L. Ennis, then a partner in the law firm of McCampbell & Young, to assist me in preparing and prosecuting Harrison County Broadcasting Company's FM construction permit application. Based upon Mr. Ennis' recommendation, and through his office, I retained Kenneth H. Larkin to serve as my consulting engineer and to prepare the technical portions of the FM construction permit application. Having retained both Mr. Ennis and Mr. Larkin, I directed Mr. Ennis to work with Mr. Larkin in securing a transmitter site suitable for the FM station in the event my application were [sic] granted by the FCC. Their collective efforts resulted in the selection of property which we all believed was owned by the James McClintock family, based upon telephone conversations my consulting engineer had with both Dr. James A. McClintock and his wife, Ruth McClintock.
>
> * * *
>
> In an effort to assure ourselves that we would have permission for the site, regardless of its ownership, we both sought to confirm the location of the McClintock property boundaries and to obtain permission from the adjoining landowner. Based on the above efforts, while we never received confirmation from the McClintock family as to the boundaries of the McClintock property, we did ultimately receive permission from the adjoining landowner for its property. In that regard, I recall the difficulty we had in getting accurate information from the McClintock family and that we tried not to bother the McClintocks unnecessarily for fear of upsetting them by constantly bothering them. In any event, by the fall of

1986, Mr. Stone advised me that we have access to our site, whether it was owned by the McClintocks or the adjoining property owner, Chester B. Stem, Inc.

Also supplied was a letter of July 2, 1986 from Poindexter to Dr. James McClintock, which letter stated:

I am writing to provide you with a status report of our FM radio station project. Previously, you discussed with our engineer, Ken Larkin, your willingness to make available for lease to us a small portion of your land for the erection of a tower.

Ken selected a 750 ft. ridge near Corydon that he believes will give excellent coverage. Recently, conversations with the courthouse in Corydon have raised a question as to whether this particular parcel is on your land or that of a neighbor, so we would like to ask you to confirm from your maps the correct ownership of the location with the site marker.

If this is your land, as Ken believes, we simply have to wait for approval from the FCC before working with you on the actual lease agreement. In the event that the land is someone else's, an amendment to the application will be necessary.

For your convenience, a self-addressed, stamped envelope is enclosed. We look forward to your reply and to working with you more in the future.

[8] Thus, for example, a letter of September 16, 1986 from Harrison counsel to the McClintocks stated in part:

Our consulting engineer spoke with both Dr. McClintock and Mrs. Ruth McClintock during February, while preparing the application. At that time, he understood that the property he ultimately chose for purposes of the application was owned by the McClintock family based upon his conversations with Dr. McClintock. Later, when I was reviewing the application with my client, as I routinely do with all such projects, I decided that some follow-up confirmation regarding the ownership of the property was appropriate, which our client, Ms. Poindexter, sought to obtain through the Harrison County Courthouse. Unfortunately, it was too difficult to confirm, one way or the other, which prompted her to write Dr. McClintock in July. My most recent letter to William followed my conversation with Dr. McClintock, who suggested that I begin contacting William directly, which, of course, was a very good idea, given Dr. McClintock's busy schedule and his distance from the property.

* * *

So that I may determine whether an amendment to the construction permit application should be filed with the FCC in Washington, I would deeply appreciate either or both of you clarifying where your property is in fact located, and whether there are any locations within your property (the higher elevation, the better) which you would prefer that we propose constructing an FM tower when seeking our construction permit from the FCC.

[9] In part, Larkin's January 25, 1988 Declaration stated:

After being retained by Harrison County Broadcasting Company on or about February 5, 1986, and during my preparation of the technical portion of the client's construction permit application, I personally spoke by telephone with both Dr. James McClintock and his wife, Ruth McClintock, so as to confirm both the availability of the McClintock property near Corydon, Indiana for a transmitter site for Harrison County Broadcasting Company and the precise boundaries of the McClintock property there for such purposes. I specifically recall being told by Dr. McClintock that he owned most of the property in the area in question, as well as the fact that he even kept a number of topographic maps in his office which he referred to as we were attempting to pinpoint a specific location for purposes of the proposed FM tower. Indeed, he indicated that he often took mental "vacations" while at his office by looking over the maps, due to the fact that his practice kept him so busy that he had little time for actual vacations.

After having discussed the situation with Dr. McClintock, I then spoke with his wife, Ruth McClintock, also by telephone, and described the area that Dr. McClintock and I had discussed. I had chosen the most suitable site within the area that I thought to be owned by the McClintocks and I described that exact location to Mrs. McClintock. She indicated to me that they indeed, owned the property and that it would be available to Harrison County Broadcasting Company for the purposes described above. Based upon my conversations with Dr. McClintock and Mrs. McClintock, I firmly believed that the site specified in Harrison County Broadcasting Company's application was in fact owned by the McClintock family, and that, of course, the site was available to Harrison County Broadcasting Company. It was only after having received such assurances that I completed preparation of the technical portion of the construction permit application, which was executed by me on February 19, 1986 and forwarded to the client, for association with the balance of the application and filing with the Commission.

Following my review of the Hearing Designation Order designating the application of Harrison County Broadcasting Company for hearing with the competing application of Corydon Broadcasters, Ltd., and discussions with Robert S. Stone, counsel for Harrison County Broadcasting Company, I now understand that, through mutual misunderstanding, I erroneously selected a transmitter site that did not in fact lie within the McClintock property. Consequently, having been advised of the above on January 20, 1988, I have diligently sought to prepare a corrective amendment, relocating the proposed transmitter site to an area definitely located on the McClintock property.

[10] In part, Dr. McClintock's February 1988 Declaration stated:

In January or February, 1986, I was contacted by telephone by an individual who identified himself as the technical consultant for Harrison County Broadcasting Company (or words to that effect) and who asked if I would be willing to lease his client enough property to erect a radio tower. I indicated that I had no reservations about such a proposal, so long as a suitable lease could be drawn up and entered into. I also discussed with him various locations which would suit his purposes. Having concluded our conversation, I directed him to my wife,

Ruth McClintock, and my son, William McClintock who were then residing in Corydon at the Mathis Road address, to more accurately identify the intended location.

Thereafter, I was contacted by Robert Stone, the attorney for Harrison County Broadcasting Company, during the summer and fall of 1986, who introduced himself as having taken over the representation of Harrison County Broadcasting Company following the resignation of his former partner who had originally handled the matter. During our conversations, I confirmed my previous communication with the consulting engineer and directed the attorney to my son for confirmation of our property boundaries and for additional information concerning the project.

McClintock went on to aver (emphasis added):

In that regard, my son and I *remain* willing to lease such property to the successful applicant for the radio station, upon execution of a lease agreement satisfactory to us which provides for reasonable rental rates consistent with the going rate at the time the agreement is executed.

[11] That letter to Stem read as follows:

As Legal Counsel for Ms. Deborah Poindexter and her Company, Harrison County Broadcasting Company, we are writing you in response to your recent inquiries as to the acceptability of the rental figure . . . you have mentioned as an amount Ms. Poindexter/Harrison County Broadcasting Company must find acceptable in order for her to be able to continue to be assured that the site would be made available to her, in the event her application for a new FM station is granted, assuming the two of you are able to reach a definitive agreement containing all the terms of the lease in the event she is awarded the construction permit she is now seeking.

So as to indicate the acceptability of the [amount deleted] per month rental figure, and Ms. Poindexter's seriousness in that regard, my client would be willing to not only accept the rental figure, but be willing to make annual payments of [amount deleted] each in advance for lease of the site. Hopefully, this will alleviate any concerns you may have had regarding her willingness or ability to agree to your suggested monthly rental figure.

Again, please understand that we are not seeking to enter into a binding, enforceable lease agreement, or even an option to enter into such a lease agreement, at this time. We are simply trying to meet our obligations to the FCC in terms of maintaining a reasonable assurance that we will be able to obtain access to the site specified in the application, should it be granted by the FCC. Naturally, should you have any questions regarding the above, please feel free to contact me at any time, or my client.

[12] In *Elijah Broadcasting*, the Commission held that what is necessary for "reasonable assurance" is:

some clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated, and that he would give notice of any change of intention.

* * *

In other words, the applicant need only obtain assurance "sufficient . . . to justify . . . belief that the . . . site [is] suitable and available until advised otherwise." *National, supra*, 2 FCC Rcd at 5643 ¶ 11, quoting *Puopolo Communications, Inc.*, 60 RR 2d 964 (Rev. Bd. 1986).

[13] In explaining the need to modify its geographic coordinates, Harrison had asserted:

The Commission's Hearing Designation Order, designating for hearing the applications of Harrison and competing applicant, Corydon Broadcasters, Ltd. ("CBL"), was released on December 29, 1987. Therein, at paras. 18-20, the Chief, Audio Services Division, disclosed that informal objections had been filed against both Harrison and CBL, challenging the accuracy of the site proposals made by each applicant, copies of which were never served on either Harrison or the undersigned counsel for Harrison. In that regard, no copies were served on either counsel for CBL, or CBL itself, according to opposing counsel's report to the undersigned. Counsel for CBL did indicate to the undersigned, however, that, while CBL's site was definitely on McClintock property, it appeared from CBL's recent inquiry that Harrison's site was indeed outside the boundaries of the McClintock property. Consequently, so as to remove all doubt as to the access Harrison in fact timely acquired for use of McClintock property as a transmitter site, Harrison has promptly prepared the amended engineering proposal proffered herewith.

Harrison Motion For Leave To Amend, filed February 1, 1988, at 2-3.

[14] The facts here are, we believe, quite distinguishable from those in *David Ortiz Radio Corp. v. FCC*, No. 90-1412 (D.C. Cir. August 20, 1991), where the court remanded on a question of whether an applicant had concealed the loss of "reasonable assurance" of its original site. There, however, the applicant learned shortly after its FCC application filing that the ostensible landowner (a government agency) did not own the land specified, and the private owner had very shortly thereafter declined use of that site. In two subsequent filings, though, the *Ortiz* applicant failed to disclose these specific facts to the Commission.

[15] The Board recognizes that Harrison filed its amendment within the 30 day grace period allotted under 47 CFR § 73.3522(b)(2) for matters "first raised" in a *Hearing Designation Order*. Nevertheless, the ALJ applied the "good cause" test to Harrison's amendment. But, the Board must also concede that not all parties, notably the Commission's Mass Media Bureau, agree with the Board's interpretation of that rule section. *See Radio Associates, Inc.*, 6 FCC Rcd 2094 (Rev. Bd. 1991). The Bureau there took the position that, especially under the Commission's "hard look" doctrine, the subject rule section affords an applicant an *absolute* right to amend within 30 days of the issuance of a designation order, without "any good" cause showing. If the Bureau's position in that case were to be deemed correct, our discussion of the due diligence element of the *Erwin O'Conner* good cause test would be moot.

[16] *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970). The good cause test set forth therein compels consideration as to whether:

(1) the amendment was pursued with due diligence;

(2) it was not required by the voluntary act of the applicant;

(3) it will not necessitate modification or addition of issues or parties;

(4) it will not disrupt the orderly conduct of the hearing or necessitate an additional hearing;

(5) it will not unfairly prejudice the other parties; and,

(6) it will not cause the applicant to gain a comparative advantage.

These six considerations are to be applied reasonably and with appropriate consideration of the equities. *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488-89 (1981). *See generally also Royce Int'l Broadcasting Co. v. FCC*, 820 F.2d 1332 (D.C. Cir. 1987). In applying the somewhat stricter "good cause" test for engineering amendments, the ALJ did not ignore precedent. *See Memorandum Opinion and Order*, FCC 88M-624, released March 7, 1988. We simply cannot say on the record facts that it was clearly shown that a change in geographic coordinates was "foreseeable" until Harrison took a much closer look after designation.

DISSENTING STATEMENT OF BOARD MEMBER ERIC T. ESBENSEN

With all due respect, I submit that the majority today affirms the award of a valuable FM construction permit to an applicant that is, in its way, no less of a sham than the Board has all too often encountered in the recent past. As a result, the "public interest" will now be entrusted to an applicant that is without true substantive qualifications to be a licensee of this Commission.

With respect to Harrison's financial qualifications and its reliance on a "bank letter" as establishing "reasonable assurance" of a $250,000 loan from the Citizens Bank of New Tazewell, Tennessee, I submit that the letter was the product of nothing more than an empty accommodation of a local banker, arising from the urgings of friends and clients who claim to have no palpable stake in Harrison's application.[1] Not only did the banker admit that he ignored basic and routine practices in providing Harrison with this letter,[2] he subsequently withdrew this document immediately after financial issues were added against Harrison (which would have subjected him to the crucible of a federal hearing proceeding -- under oath, on the record, and exploring his role and motivations in the preparation and issuance of the letter). And, I have no more faith in the subsequent bank letter obtained by Harrison to demonstrate its "new" reasonable assurance. *See* P&O Exceptions at p.34, *et seq*.

Concerning Harrison's original transmitter site, and even accepting the facts in a light most favorable to Harrison, I submit that it was entirely "foreseeable" that Harrison could not demonstrate reasonable assurance of its originally-specified transmitter site. Additionally, Harrison did not take further steps to obtain a different site until the whistle was blown in the *Hearing Designation Order*. Rather than apply the *strict* unforeseeability standards of 47 CFR § 73.3522(b)(i), *see, e.g., Royce International Broadcasting, ante* note 16, the majority here has permitted Harrison to amend to an *entirely new site*,[3] even though it apparently had no "reasonable assurance" whatever of its *original* site.

All in all, I submit that Harrison has barely escaped disqualification only by a naive reading of the record and a flaccid application of well-established standards the Board has generally applied more firmly. At a minimum, this proceeding should have been remanded on the transmitter site and real-party-in-interest questions advocated by P&O. But even on the present record, I would have disqualified Harrison on the specified financial issue.

FOOTNOTES TO DISSENTING STATEMENT

[1] Although no real-party-in-interest issue was added because of a finding that the attacks on Harrison were based on "speculation," the questions raised were, in fact, based on strong circumstantial evidence demonstrating that others may have an undisclosed interest in Harrison's application. *See, e.g.*, Tr. 632-636.

[2] The deposition testimony of the banker, William Charles Lewis, Chief Exceutive Officer of Citizens Bank, New Tazewell, Tennessee, affirms the disingenuousness of the so-called "commitment letter" (Deposition Tr. 5-8, 21-22, 24-25):

> [P&O Counsel]: Now, are you acquainted with a Debbie Poindexter?
>
> A: Yes.
>
> Q: When did you first meet Debbie Poindexter?
>
> A: It's been quite a number of years ago. I couldn't put a date to it.
>
> Q: Was it when she was employed by the United American bank?
>
> A: Yes.
>
> Q: Were you a correspondent bank for United American bank?
>
> A: Yes.
>
> Q: Do you recall whether you met her at the United American Bank?
>
> A: I met her at the bank.
>
> Q: Social affairs at the bank?
>
> A: Social affairs that they had.
>
> * * *
>
> Q: You met her at a social affair and thereafter did you see her on any other occasions?
>
> A: Yes, at different times there at the bank. I couldn't say how many.
>
> Q: In what capacity was she working at the bank at that time?
>
> A: Well, when I saw her it was at the social functions.
>
> Q: So each time you saw her was at a social function. Did she host the social functions?

A: She helped host the functions.

* * *

Q: Now, the United American Bank failed; is that correct?

A: Yes, that's correct.

Q: And after the failure of the United American Bank, did you see Miss Poindexter again?

A: Yes.

You mean before she came here?

A: Yes. I saw her at Sam's Wholesale Club; she was working there.

Q: You went in as a customer?

A: I went in to join up, pay my dues and become one of them.

Q: And you happened to see her there?

A: Yes.

Q: So then after Sam's Wholesale Club, did you see her again?

A: Not until she contacted me and came here to the bank.

* * *

Q: When Deborah Poindexter came to see you about the letter, she did not have a balance sheet with her, did she?

A: No.

Q: Have you ever written a letter of this sort for any other company?

A: You mean in the broadcasting industry?

Q: Yes, in the broadcasting industry.

A: No.

* * *

[Harrison Counsel]: While Miss Poindexter had not -- you indicated that Miss Poindexter did not have with her a balance sheet. Before you issued this letter, did you inquire of Miss Poindexter, generally speaking, about her personal financial condition just in general?

A: We talked about it there. Do you want me to elaborate on it?

Q: Just tell us the nature of that conversation.

A: We talked about outstanding debts and it seemed like mostly she had in that was month to month minor things and the assets weren't too great, as I recall it, but we did talk about it and I asked her, well, if we run a credit check, what are we going to come up with, and she said that she didn't have any problem with that, she knew it would turn up good.

* * *

[P&O Counsel]: Did you run a credit check on Deborah Poindexter?

A: No.

Q: Have you ever run a credit check on Deborah Poindexter?

A: No.

Q: But you wouldn't actually loan any money to anybody without running a credit check, would you?

A: No.

Q: You say that her assets weren't too great; as a matter of fact, she didn't have any, did she?

A: I don't recall what she told me what she said she had, but I do remember that she didn't have that much.

Q: In any event, the only information you had about assets were oral?

A: Yes.

Q: You certainly wouldn't loan any money to anybody without a balance sheet, would you?

A: No.

Q: Normally you'd want to see at least two years income tax returns, wouldn't you?

A: Yes.

Q: Did you ever see her income tax returns?

A: No.

[3] Harrison did not merely amend to "correct" its originally-specified geographic coordinates; it actually *moved* its proposed transmitter site to another parcel of land.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-580

In the Matter of

Amendment of Section 73.202(b),	RM-6977
Table of Allotments,	RM-7177
FM Broadcast Stations.	RM-7446
(Elkins, West Virginia, Mountain Lake Park and Westernport, Maryland)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1991; Released: October 11, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 8704 (1989), issued in response to two separate petitions for rule making. Marja Broadcasting Corporation ("Marja"), licensee of Station WDNE(FM) (formerly WVHT(FM)), proposes the substitution of Channel 255B1 for Channel 257A at Elkins, West Virginia, and the modification of its license to specify operation on the higher powered channel; the substitution of Channel 283A for Channel 255A at Mountain Lake Park, Maryland, and the modification of the construction permit of Station WKHJ(FM) at Mountain Lake Park to specify operation on the new frequency in order to permit the upgrade at Elkins (RM-6977). Ernest F. Santmyire ("Santmyire"), permittee of Station WWPN(FM), proposes the substitution of Channel 283A for Channel 224A at Westernport, Maryland, in order to increase its power to 6 kW, and the modification of his construction permit to specify operation on the new channel (RM-7177). Marja and Santmyire filed comments in support of their respective proposals and reaffirm their intention to apply for the requested channels, if allotted. G. C. Kincer filed a counterproposal, which was subsequently withdrawn, proposing the allotment of Channel 283A at Masontown, West Virginia, as the community's first local FM service. Roger Lee Ruff ("Ruff"), permittee of WKHJ, Channel 255A, Mountain Lake Park, Maryland, filed a consolidated answer to the show cause order and a counterproposal (RM-7446).[1] Reply and further reply comments were filed by Ruff and Marja.

2. Marja in its comments contends that the substitution of Channel 255B1 for Channel 257A at Elkins would serve the public interest by providing expanded service to a larger area and population. Marja also supports Santmyire's proposal at Westernport to increase its power to 6 kW, and suggests that both goals can be accommodated if Santmyire will accept operation on Channel 266A or Channel 281A in lieu of Channel 224A. Marja reaffirms its willingness to reimburse Station WKHJ(FM) at Mountain Lake Park for reasonable costs incurred for the frequency change.

3. Santmyire, in his comments, agrees with Marja that both proposals can be granted, and suggests the substitution of either Channel 237A or 239A for Channel 255A at Mountain Lake Park. Santmyire concludes that the public interest would best be served by granting both proposals and permitting the two operating stations to upgrade service to their communities. Santmyire argues in the alternative that his proposal would provide reception service to an additional 46,378 persons with maximum class facilities from its proposed reference point. He argues that Marja would have to construct a 251 meter (823 foot) tower in order to achieve the equivalent maximum HAAT (100 meters) from the reference coordinates specified in its proposal, and therefore Marja may not be able to achieve maximum Class B1 facilities and a large population increase. Further, Santmyire argues, Commission allotment priorities are clear that provision of a first full-time aural service to a community is its first priority in allotting, citing *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), *recon. denied* 56 RR 2d 448 (1984).[2]

4. Ruff opposes Marja's proposal and submits a counterproposal proposing the substitution of Channel 255B1 for Channel 255A at Mountain Lake Park and the modification of its construction permit accordingly; the substitution of Channel 262B1 for Channel 257A at Elkins and the modification of its license accordingly; and the substitution of Channel 283A for Channel 224A at Westernport and the modification of its construction permit accordingly. In support of its counterproposal, Ruff contends that, under the FM allotment priority of "other public interest matters," a greater number of people can be served to the betterment of the public interest. In terms of population served, Ruff contends his proposal exceeds Marja's by 2,257 persons at the 70 dBu contour, by 46,568 person at the 60 dBu contour, and by 86,659 persons at the 54 dBu contour.

5. In its reply comments, Marja argues that Ruff's claim of superior coverage resulting from adoption of his counterproposal is based on the false assumption that Marja would not use a maximum facility on Channel 255B1. Marja submits in an engineering statement comparing the maximum facilities employed by the two proposals that Marja's proposal is clearly the superior use of the frequency. Marja states it would provide service to over 85,500 persons within a 4,400 square kilometer area, whereas Ruff would serve only 74,847 persons within a 4,740 square mile area. Marja contends Ruff used a 54 dBu comparison for the coverage rather that the accepted coverage standards of 60 dBu. Therefore, claims Marja, Ruff's figures regarding 54 dBu and 50 dBu coverage are irrelevant. Marja also argues that Ruff could not provide city grade coverage over Mountain Lake Park, as there is

[1] Public Notice of the Ruff counterproposal was given on July 18, 1990, Report No. 1823.

[2] Although the Commission's allotment priorities are clear that provision of "first full-time aural service" to a community is its first priority in allotting channels, Santmyire seeks an increase in power of its FM transmission service at Westernport. This falls under the fourth allotment priority of "other public interest matters."

substantial shadowing resulting from a high mountain ridge situated along the 15 radial between the proposed site and the city. Marja states that Mountain Lake Park is situated approximately 500 feet below the line-of-sight from Ruff's proposed site. Therefore, Marja contends, there is a significant question as to whether an appropriate city grade signal would be provided to the proposed community of license. Finally, Marja argues that Ruff's claim that Channel 262B1 is available as a substitute for Channel 255B1 at Elkins is incorrect, as Commission records show that Channel 262A was allotted to Webster Springs, West Virginia, in MM Docket No. 89-106. Marja concludes that its original petition to use Channel 255B1 at Elkins is superior to Ruff's counterproposal, and thus its petition should be granted and Ruff's counterproposal denied. In further reply comments, Marja and Ruff reiterate their respective positions.

6. In his consolidated reply, Ruff supports the arguments filed in Santmyire's comments insofar as Santmyire requests the allotment of Channel 283A at Westernport, but rejects his proposal for the allotment of Channel 237A or 239A at Mountain Lake Park and the allotment of Channel 255B1 at Elkins. Ruff argues that Marja should not be permitted to benefit from the assumption that it will operate its proposed Class B1 facilities at full power. Ruff agrees with Santmyire that the service population increase proposed by Marja is attainable only if it is assumed that Marja can operate at full power from its identified transmitter site. Ruff acknowledges the Commission's longstanding policy of evaluating proposals on the assumption that each proposed new facility will operate at full power, citing *Greenup, Kentucky and Athens, Ohio*, 4 FCC Rcd 3843 (1989); and *Roanoke Rapids, North Carolina*, 9 FCC 2d 672 (1967). However, Ruff argues, the assumption of full power, as here, is potentially decisionally significant and that the Commission should disregard the full power assumption and compare the merits of the Marja proposal with Ruff's proposal on the basis of assumed "reasonable facilities" for Marja determined in accordance with *Roanoke Rapids* and subsequent cases involving Class C allotments. If Marja operated at full power at an assumed tower height of 500 feet, increased service population under Marja's proposal would dwindle to 5,856 persons, and at assumed tower heights under 400 feet, a decrease in service population would occur. Therefore, Ruff asserts that its proposal should be granted and Marja's proposal denied. In the alternative, Ruff argues that Marja should be required to certify that it will construct and operate full power facilities if Channel 255B1 is allotted to Elkins; that it has received reasonable assurance of the availability of FAA and local zoning approval authorizing construction of a tower of sufficient height to permit full power operation; and that it has sufficient assets to undertake and complete such construction.

7. We conclude that Ruff's counterproposal should be denied. A Commission engineering analysis has determined that city grade coverage could not be provided to Mountain Lake Park by Channel 255B1 from the site proposed by Ruff because there is a mountain ridge which causes a terrain obstruction. Ruff has not shown that there is a particular site that can provide a clear line-of-sight service to the community pursuant to Commission Rule 73.315(b). *See, e.g., Creswell, Oregon*, 3 FCC Rcd 4608 (1988), *recon. denied*, 4 FCC Rcd 7040 (1989) (an allotment will not be made in the absence of a reasonable assurance that a suitable site area exists from which a station could operate in accordance with Commission Rules). Indeed, a Commission engineering analysis suggests that a tower of 225 meters would be necessary to provide city grade coverage to Mountain Lake Park, which Ruff has not shown he would be willing to build.

8. We disagree with Ruff's contention that we should not assume maximum power for Marja's proposal. Our practice is to assume maximum facilities on all but Class C and Class A allotments. *See Greenup, Kentucky and Athens, Ohio*, 6 FCC Rcd 1493 (1991). In *Greenup*, we upheld the principle set in *Roanoke Rapids* that in calculating coverage or potential coverage from an allotment, we should assume the use of "reasonable facilities." We also conclude that the specific depiction of what constitutes "reasonable facilities" is not a static model, but one that changes with time as the service evolves. Therefore, while we continue, consistent with *Roanoke*, to use the 1.0 mV/m contour as the basis for coverage determinations for all classes of FM stations, we follow *Greenup* by assuming the use of maximum facilities on all but Class C and Class A allotments. Assuming maximum facilities, we find, as stated in Marja's reply comments, that Marja's proposal would provide service to 85,540 persons (additional service to 45,290 persons) while Ruff's proposal would provide service to 74,847 (additional service to 40,795 persons) in Mountain Lake Park.

9. Ruff incorrectly asserts that Channel 262B1 could be allotted to Elkins. However, this allotment would be short-spaced to Channel 262A at Webster Springs, West Virginia and Station WCLG, Channel 261A, Morgantown, West Virginia. Although Ruff claims in its reply comments that another channel could be allotted to Webster Springs, this request constitutes an untimely counterproposal and will not be considered.

10. In consideration of the information above, we believe the public interest would be served by the substitution of Channel 255B1 for Channel 257A at Elkins, West Virginia, and the modification of Station WDNE(FM)'s license accordingly, as well as the substitution of Channel 239A in lieu of Channel 255A for Station WKHJ(FM) at Mountain Lake Park, Maryland, in order to accomplish the upgrade. In addition, Channel 283A is substituted for Channel 224A at Westernport, Maryland, and the construction permit of Station WWPN(FM) modified accordingly. Channel 255B1 can be allotted to Elkins in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.9 kilometers (0.6 miles) west of the community. [3] Channel 239A can be allotted to Mountain Lake Park without a site restriction at the current site of Station WKHJ(FM). [4]

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[3] The coordinates for Channel 255B1 at Elkins are North Latitude 38-55-25 and West Longitude 79-51-33.

[4] The coordinates for Channel 239A at Mountain Lake Park are North Latitude 39-24-37 and West Longitude 79-17-15. Because the petition which resulted in this allotment was filed prior to October 2, 1989, permittee may avail itself of the provisions of Section 73.213(c)(1) of the Commissions Rules with respect to Station WKYE, Channel 238B, Johnstown,

Channel 283A can be allotted to Westernport with a site restriction of 7.3 kilometers (4.5 miles) northeast at the site of petitioner. [5] In accordance with Section 1.420(g) of the Commission's Rules, we will also modify Marja's license for Station WDNE(FM) at Elkins to specify operation on Channel 255B1. We will also modify Ruff's construction permit for Station WKHJ(FM) at Mountain Lake Park to specify operation on Channel 239A, and modify Santmyire's construction permit for Station WWPN(FM) at Westernport to specify operation on Channel 283A.

11. Since Elkins is located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia, Marja will be required to comply with the notification requirement of Section 73.1030(a) of the Commission's Rules. Marja states that it has made the preliminary notification.

12. Commission policy requires reimbursement of affected stations for the reasonable costs associated with changing frequencies. *See Circleville and Columbus, Ohio,* 8 FCC 2d 159 (1967). Marja has stated its intention to reimburse Station WKHJ(FM) at Mountain Lake Park for its reasonable costs incurred in changing frequencies.

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Elkins, West Virginia	234B1, 255B1
Mountain Lake Park, Maryland	239A
Westernport, Maryland	283A

14. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Marja Broadcasting Corporation for Station WDNE(FM), Elkins, West Virginia, IS MODIFIED to specify operation on Channel 255B1, in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

15. IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Roger Lee Ruff for Station WKHJ(FM), Mountain Lake Park, Maryland, IS MODIFIED to specify operation on Channel 239A in lieu of Channel 224A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WKHJ(FM)'s construction permit, BLH-880203MN, except the channel asspecified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with Station WKHJ(FM)'s construction permit, BLH-880203MN, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Ernest F. Santmyire for Station WWPN(FM), Westernport, Maryland, IS MODIFIED to specify operation on Channel 283A in lieu of Channel 224A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WWPN(FM)'s construction permit, BPH-870331PH, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with Station WWPN(FM)'s construction permit, BPH-870331PH, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

17. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the permittee, as follows:

Roger Lee Ruff
1002 Pittsburg Avenue
Mountain Lake Park, Maryland 21550

Pennsylvania (40-22-18 and 78-58-57), and Station WTBZ-FM, Channel 240A, Grafton, West Virginia (39-21-16 and 80-01-27). *See* 47 CFR Section 73.213(c).

[5] The coordinates for Channel 283A at Westernport are North Latitude 39-31-22 and West Longitude 78-58-26.

18. IT IS FURTHER ORDERED, That the counter-proposal of Roger Lee Ruff (RM-7446) IS DENIED.

19. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

20. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-161

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Jasper, Texas)	RM-7701

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1991; Released: October 11, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of James M. Lout ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 3527 (1991), proposing the allotment of Channel 297A to Jasper, Texas, as the community's third local FM transmission service. Petitioner filed comments and further comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 297A to Jasper, Texas, since it would provide the community with its third local FM transmission service. Channel 297A can be allotted to Jasper in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.5 kilometers (0.9 miles) north of the community to avoid a short-spacing to the vacant allotment of Channel 297C3, Lake Arthur, Louisiana. [1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Jasper, Texas	264C2, [2] 274C2, 297A

4. The window period for filing applications will open on **November 26, 1991,** and close on **December 26, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] The coordinates for Channel 297A at Jasper are North Latitude 30-56-13 and West Longitude 93-59-47.

[2] As stated in the *Notice* , Roy A. Henderson, d/b/a Timberline Communications, licensee of Station KJAS(FM), has a counterproposal pending in MM Docket No. 90-90, 5 FCC Rcd 1274 (1990), requesting to relocate Station KJAS(FM), Channel 264C2, from Jasper to Winnie, Texas.

Before the
Federal Communications Commission
Washington D.C. 20554

MM Docket No. 90-385

In the Matter of

Amendment of Section 73.202(b),	RM-7220
Table of Allotments,	RM-7541
FM Broadcast Stations.	
(Trade, Tennessee, and Beech Mountain, North Carolina)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1991; Released: October 11, 1991

By the Chief, Allocations Branch:

1. At the request of Trade Communications of Mountain City, Tennessee, ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 5279 (1990), proposing the allotment of Channel 272A at Trade, Tennessee, as that community's first local broadcast service. Petitioner filed comments restating its interest to apply for the channel, if allotted. [2] Frances G. Atkinson ("Atkinson") filed supporting comments expressing an interest in applying for Channel 272A at Trade. Joe A. Copley ("Copley") filed a counterproposal requesting the allotment of Channel 272A to Beech Mountain, North Carolina, as a first local service. [3] Petitioner and Copley filed reply comments. Smith Communications, Inc., ("Smith") filed reply comments to the counterproposal.

2. In the *Notice*, petitioner was requested to furnish data to support that Trade is a community since it is not listed in the U.S. Census. Specifically, petitioner was requested to provide information as to the social, economic, cultural or governmental indicia to warrant a clear determination that Trade is a community for allotment purposes. Petitioner recognizes that Trade is neither incorporated nor listed in the U.S. Census. However, it submits that Trade is a community for allotment purposes. To this end, petitioner notes that Trade has a population of approximately 1000 persons and has its own post office, a church and a fire department. In addition, petitioner provided the Commission with several exhibits purporting to demonstrate that Trade does qualify as a "community." These exhibits include copies of published articles that denote the historical significant of Trade as the "oldest community" in the state of Tennessee; supportive letters from governmental and community leaders;[4] and a petition signed by a number of individuals attesting to their belief that Trade is a community.

3. In supporting comments, Atkinson submits that Trade has its own post office, churches, business establishments, and a local National Guard armory. Atkinson states that the Rand McNally Atlas, which only attributes 150 persons to Trade, is dated and does not reflect the population of Trade nor the areas immediately adjacent to the community. Atkinson contends there is a need for a local medium at Trade to inform the residents of school and road closings because of the changing weather conditions during winter. Atkinson notes the Commission has previously allotted FM channels to communities like Trade citing *Semora, North Carolina*, 5 FCC Rcd 934 (1990). Atkinson states she will apply for a construction permit at Trade if the channel is allotted.

4. In his counterproposal, Copley requests the allotment of Channel 272A to Beech Mountain, North Carolina, as that community's first local aural service. In support of his request, Copley states that Beech Mountain has been an incorporated community since 1981 and is listed in the U.S. Census. Copley adds that Beech Mountain has a Mayor, Vice Mayor, City Council, Chamber of Commerce, Planning Board, Economic Development Commission, hotels, police, fire department, water, sewer and business district. In addition, Copley has submitted a letter from Beech Mountain's town manager attesting that while the town's permanent population is only 279 persons, the seasonal population often exceeds 10,000 and the town provides all normal municipal services throughout the incorporated area. Copley states he will apply for a permit to construct a new station at Beech Mountain, if the channel is allotted to that community.

5. In response to Copley's counterproposal, Smith, licensee of Station WZJS(FM), Banner Elk, North Carolina, states that the public interest would not be served by allotting Channel 272A to Beech Mountain because of its small population of 279 persons. Smith contends that pursuant to the "quiet village doctrine," the Commission has denied communities of that size allotments in favor of other larger communities that already had local aural outlets citing *e.g. Beacon Broadcasting*, 63 RR 2d 794 (1987), and *Ruarch Associates*, 58 RR 2d 1642 (1985). Further, Smith describes Beech Mountain as a vacation spot bisected by the Avery and Caldwell county lines and claims Beech Mountain is the name of the location of ski run and a few shops, not a community for FM allotment

[1] The community of Beech Mountain, North Carolina, has been added to the caption.

[2] As stated in the *Notice*, since the petitioner's request was signed only by its technical consultant, the petitioner was requested to clarify the status of its technical consultant and comply with the requirements of Section 1.52 of the Commission's Rules. In response, petitioner submitted comments prepared by legal counsel; thus its initial failure to fulfill all subscription and verification requirements has been remedied.

[3] Public Notice of the counterproposal was given on November 13, 1990, Report No. 1828.

[4] Petitioner's exhibit consists of letters from Herbert L. Harper, executive director and deputy state historic preservation officer for the Tennessee Historical Commission; United States Congressman James H. Quillen; Tommy Walsh, Chairman of Johnson County Tourism Committee; Burl Brown, Member of the Johnson County Court; Harvey Reece, Member of Trade Volunteer Fire Department; Larry Wallace, Postmaster, U.S. Post Office - Trade; and Bernice Reece, Chairperson of Trade Days Festival.

purposes. Smith contends Beech Mountain is adequately served by Station WZJS(FM) and AM and FM stations located in Bristol and Johnson City, Tennessee. [5]

6. In reply comments, petitioner reiterates that Trade is the preferred community in accordance with the Commission's allotment priorities. According to petitioner, Trade is a community that is substantially larger than Beech Mountain and is included within the 1980 Census Enumeration District for the Mountain City, Tennessee division, whose overall population is 8,758. Petitioner argues that Copley has not shown that Beech Mountain is any larger than 279 persons. Petitioner contends that Beech Mountain's "peak population" does not exceed 6,500 to 7,000 persons. [6] Petitioner further believes that such a population figure includes transitory or tourist populations in addition to actual residents of the community. Finally, petitioner argues that Trade, because of its isolated location, is in greater need of its own local FM service whereas, Beech Mountain "a ski resort" is located near Banner Elk, North Carolina, to which Station WZJS(FM) is licensed.

7. Copley refutes petitioner and Atkinson's claims regarding Trades's population, noting both parties' failure to submit any maps in order to delineate the geographical area in which these persons live. Also, Copley contends using the Commission's quiet village doctrine, Beech Mountain would be preferred over Trade. As such, Copley states Beech Mountain has six hotels accommodating 5,000 persons, eight restaurants, five night clubs, a ski shop, real estate agencies, grocery stores, numerous specialty shops, and 17 different festivals or special events during the year.

8. Based upon the showing submitted by petitioner, we do not believe that Trade is a community for allotment purposes. The Commission's long standing policy is to require allotments be made to communities composed of geographically identifiable population groupings. This requirement is generally satisfied if the proposed community is either incorporated or listed in the U.S. Census. Although the 1988 edition of the *Rand McNally Commercial Atlas* lists Trade as having a population of 150, the town is neither incorporated nor listed in the U.S. Census. In this regard, the Commission has stated that mere geographical location is not sufficient to establish "community status." *See Vimville, Mississippi*, 48 FR 5974 (1983), and *Hannibal, Ohio*, 6 FCC Rcd 2144 (1991). Notwithstanding petitioner states that Trade is included in a 1980 Census Enumeration District (CED) with a population of 8,758. However, according to the U.S. Census Bureau, a CED is a geographic area that has been defined for the purpose of data gathering in rural areas for the 1980 census. CEDs very often include a number of communities and isolated pockets of population; thus we are not convinced that the inclusion of Trade in a CED necessarily denotes community status for allotment purposes. In addition, petitioner provided no information as to the existence of any local government or businesses which identify themselves with Trade. Petitioner has not shown that the residents of Trade receive any municipal services, such as police or water. Nor is there any newspaper in Trade. Petitioner also provided a letter from the Postmaster of the U.S. Post Office located at Trade, stating the community has an approximate population of 1,000. [7] Based on the postmaster's population assertion, we inquired at the U.S. Postal Service ("USPS") regarding Trade's mail deliveries. The USPS's Knoxville Division confirmed that Trade's post office has one rural route providing service to 402 families scatter over a 20 mile radius. In fact, USPS states that Trade's post office is designated for rural delivery and is not characterized as a "cluster type" post office. [8] In addition, petitioner has not shown other indicia of community status such as political, social, or business organizations, or testimony of local residents. The petition submitted by the alleged residents of Trade is only a list of 129 signatures void of addresses; thus the residence of the signing parties cannot be verified. [9] With the exception of letters from the Chairperson of Trade Days Festival and a member of Trade's Volunteer Fire Department, petitioner has not specifically identified any businesses or other organizations which identify themselves with Trade. There are no community organizations, such as a Chamber of Commerce, Rotary Club or Lion's Club. Our review of the supportive letters submitted from government and community leaders indicate four out of seven of the letters are from persons representing the state or Johnson County areas. In this regard, it appears that there is no local government.

9. Based upon Copley's showing, we find that Beech Mountain is a community for allotment purposes. Although Copley's petition includes a statement from the town's manager that the permanent population is only 279 persons, Beech Mountain is listed in the U.S. Census as an incorporated community with a population of 662 persons. Beech Mountain is governed by a Mayor and City Council. Furthermore, Beech Mountain's town manager states "the Town maintains 67 miles of roads, and provides water and sewer. All normal municipal services are available throughout the incorporated area, including municipal garbage service, police, fire and rescue." Smith's allegations concerning the nature of the Beech Mountain community do not alter our conclusion. The fact that Beech Mountain is a resort hamlet bisected by the Avery and Caldwell county lines and is also the location of a ski run does not make it any less a community. Indeed, considering the population of Beech Mountain, it appears to be a fairly vibrant community.

10. We believe that the public interest would be served by allotting Channel 272A to Beech Mountain since it could provide the community with its first local aural service. [10] Channel 272A can be allotted to Beech Moun-

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[5] Smith states that part of Beech Mountain will be served by WUSJ(FM), Channel 257C2, Elizabethton, Tennessee, and are presently served by AM stations such as WATA, Boone, North Carolina, WIVO, Blowing Rock, North Carolina, and non-commercial FM Station WASU, Boone, North Carolina.

[6] Petitioner states these peak population figures were ascertained from Beech Mountain's town manager.

[7] The presence of a post office at Trade is not sufficient to establish community status. *See Columbia, CA*, 6 FCC Rcd 3292 (1991), and *Coker, Al*, 43 RR 2d 190 (1978).

[8] A cluster type post office is described by USPS as a post office serving a cluster of persons.

[9] Our review of the petition indicates that duplicative signatures may have been submitted.

[10] Since we have determined that Trade is not a community

tain, North Carolina, in compliance with the Commission's minimum spacing requirements without the imposition of a site restriction. [11]

11. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Beech Mountain, North Carolina	272A

12. The window period for filing applications for Channel 272A at Beech Mountain, North Carolina, will open on **November 26, 1991,** and close on **December 26, 1991.**

13. IT IS FURTHER ORDERED, That the petition for Rule Making filed by Trade Communications of Mountain City, Tennessee, (RM-7220) requesting the allotment of Channel 272A to Trade, Tennessee, IS DENIED.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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for allotment purposes, we need not address the issues raised by Smith regarding the "quiet village doctrine" and the relative needs of Beech Mountain and Trade for a first local aural service.

[11] The coordinates for Channel 272A at Beech Mountain are North Latitude 36-15-48 and West Longitude 81-48-28.

Before the
Federal Communications Commission
Washington DC 20554

MM Docket No. 91-299

In the Matter of

Amendment of Section 73.606(b), RM-7812
Table of Allotments,
TV Broadcast Stations.
(Tamuning, Guam)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 3, 1991; Released: October 11, 1991

Comment Date: December 2, 1991
Reply Comment Date: December 17, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Guahan Airwaves, Inc. ("petitioner"), seeking the allotment of UHF Channel 20 to Tamuning, Guam, as that community's second local television broadcast service. Petitioner states its intention to apply for Channel 20, if allotted.

2. In support of its proposal petitioner states Tamuning (population 8,862)[1] is the second largest community in Guam, and Guam itself has an estimated 1988 population of 133,000.

3. A staff engineering analysis has determined that television Channel 20 can be allotted to Tamuning in compliance with the Commission's minimum distance separation requirements. [2] Although the Commission has imposed a freeze on television allotments in certain areas, Tamuning is not in one of the affected areas. [3]

	Channel No.	
City	Present	Proposed
Tamuning, Guam	14	14, 20

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

5. Interested parties may file comments on or before **December 2, 1991,** and reply comments on or before **December 17, 1991** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Michael J. Hirrel
1300 New York Avenue
Suite 200-E
Washington, D.C. 20005
(Attorney for Guahan Airwaves, Inc.)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the

[1] Population figures were taken from the 1980 U.S. Census.
[2] The coordinates for Channel 20 at Tamuning are North Latitude 13-29-02 and West Longitude 144-46-36.
[3] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed. Reg. 28346, July 29, 1987.

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
October 3, 1991

Released: October 15, 1991

George A. Lato, Esq. 8330-M
DeBlieux, Frederick & Lato 91090831
Suite 200
200 Government Street
Baton Rouge, LA 78021

Dear Mr. Lato:

This is in response to your complaint, dated September 23, 1991, supplemented by letter dated October 1, 1991, against television stations WBRZ, Baton Rouge; WWL, New Orleans; KLFY-TV, Lafayette; KNOE, Monroe; and KTBS and KSLA in Shreveport, Louisiana ("the Stations"), alleging violation of Section 315(a) of the Communications Act. 47 U.S.C. Section 315(a).

According to your complaint, your client, Fred C. Dent, Jr., a legally qualified candidate for the office of Governor of Louisiana, has been excluded from a debate sponsored by the Stations, to be televised on October 5, 1991. You explain that of the 12 candidates for Governor, the Stations invited only those candidates who achieved a 7% or greater rating, in a poll conducted by Ed Renwick, to participate in the debate. Only four candidates qualified, and you claim that Mr. Dent is ranked 5th in the polls. You do not, however, indicate what percentage Mr. Dent achieved in the poll.

Your supplemental filing also alleges that the Stations each contributed $10,000 in return for a satellite feed with which to air the debate, services of a pollster and the results of his poll, and election returns on the night of the elections.

You allege that Mr. Dent is a "serious" candidate for office and that he is legally entitled under Section 315(a) of the Communications Act to equal opportunities for an amount of time equal to the amount of time in which his opponents appear in the debate.

DISCUSSION

Section 315 of the Communications Act provides that if a licensee permits a legally qualified candidate for public office to "use" a broadcast station (an appearance by picture or voice), it must afford equal opportunities to other such candidates for that office. In 1959, Congress, in an effort to encourage increased news coverage of political campaign activity, amended Section 315 to exempt from equal opportunities appearances by legally qualified candidates on the following news programs:

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of a bona fide news event (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a).

The Commission, in *Aspen Institute*, 55 FCC 2d 697 (1975), *aff'd sub nom., Chisholm v. F.C.C.*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 97 S. Ct. 247 (1976), held that a debate between two or more candidates, sponsored by third parties, qualified as on-the-spot coverage of a bona fide news event, exempt from the equal opportunities provision of Section 315(a). In *Henry Geller*, 95 FCC 2d 1236 (1983), the Commission expanded *Aspen Institute*, holding that broadcaster-sponsored debates would also be exempt from Section 315(a) as on-the-spot coverage of bona fide news events.

In support of your request for equal opportunities, you argue that:

1) A station-sponsored debate between candidates does not qualify for an exemption under Section 315(a)(4).

2) Exclusion of a "major" or "serious" candidate such as Mr. Dent removes the debate from the Section 315(a)(4) exemption.

3) The debate was organized to promote the candidacy of the participants and is therefore not exempt under Section 315(a).

4) The fact that each station contributed $10,000 and received a "package" in return takes the debate out of the bona fide news event exemption under Section 315(a)(4).

Your assertion that broadcaster-sponsored debates are not exempt from equal opportunities under Section 315(a) is incorrect. As noted above, the Commission in *Henry Geller* ruled that broadcaster-sponsored debates qualified for an exemption under Section 315 as bona fide news events. The decision that you rely on, *DeYoung v. Patton*, 898 F.2d 628 (8th Cir. 1990), appears to be unaware of the Commission's earlier decision in *Henry Geller*.

Second, you argue that the Stations may not exclude a "serious" candidate from a debate and still qualify for the 315(a) exemption. In support of this, you cite our decision in *The American Independent Party*, 62 FCC 2d 4 (1976) (*AIP*). Your position is not supported by the *AIP* decision. In footnote 3 therein, the Commission clearly stated that its decision in *Aspen Institute* did not establish any requirement that all so-called "major" or "serious" candidates participate in a debate in order for the debate to come within the exemption. *American Independent Party*, 62 F.C.C. 2d at n. 3. A station is free to choose its participants, provided that its intent is not to further the candidacy of any particular individual.

Third, you argue that the Stations were unreasonable in using the 7% achievement in the polls as a cut-off point for excluding candidates. You argue that because there are three Republican candidates and only one Democratic

candidate entitled to participate that the purpose of the debate is to advance the candidacy of the Democratic candidate.

You have not shown that the Stations' predetermined use of 7% as the cut-off point was unreasonable, nor do we find your argument that such a cut-off was chosen to promote the candidacy of the Democratic participant persuasive. Indeed, you have provided no information regarding Mr. Dent's rating in the polls. Moreover, there is no indication that the poll was biased or deceptive in any way. Thus, you have presented no evidence to show that the Stations have acted unreasonably in their selection of participants in the debate.

Finally, you argue that because the Stations each paid consideration for the program, and that the program was part of a larger package, that the debate does not qualify as an on the spot coverage of a bona fide news event. Neither our decision in *Aspen Institute* nor *Henry Geller* indicates that the on-the spot news exemption would not be applicable to situations where stations contribute funds to jointly sponsor a debate, and you have failed to demonstrate why our holdings in those cases are not applicable in this situation.

CONCLUSION

Based on the foregoing, we find you have provided no evidence that the debate sponsored by the Stations is not an "on-the-spot coverage of a bona fide news event." Therefore, your complaint IS DENIED.

This action is taken pursuant to delegated authority. Application for Review by the Commission may be requested within thirty days of the date of public notice of this ruling (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Commission Rule 1.115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross
Chief, Fairness/Political
Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 4, 1991

NEW DEFINITION OF EFFECTIVE COMPETITION AND STANDARDS FOR BASIC CABLE RATE REGULATION EFFECTIVE OCTOBER 25, 1991 (MM Docket No. 90-4)

On June 13, 1991, we adopted a *Report and Order and Second Further Notice of Proposed Rule Making* (*Order*) in MM Docket No. 90-4 (6 FCC Rcd 4545 (1991)) redefining "effective competition" and establishing new rate-setting standards for the regulation of basic cable service rates. In that *Order*, we stated that the new rules would become effective on October 25, 1991, pending approval by the Office of Management and Budget (OMB). OMB approved the new rules on September 26, 1991. Accordingly, they will become effective on October 25, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-306

In re Applications of

Henry R. Malloy, Jr. d/b/a REM MALLOY BROADCASTING	File No. BPH-860627MH
PEEBLES BROADCASTING COMPANY	File No. BPH-860603ME
James S. Lee and Donald L. Baker d/b/a INTERACTIVE MEDIA	File No. BPH-860707MS
FREE AIR CORPORATION	File No. BPH-860707NH
BERNARD DAWSON	File No. BPH-860707NW
SPECIAL MARKETS MEDIA, INC.	File No. BPH-860703MH

For Construction Permit for
New FM Station, Channel 275A,
Raleigh, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: October 4, 1991 **Released: October 17, 1991**

By the Review Board: MARINO (*Chairman*), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board are the *Initial Decision*, 5 FCC Rcd 8423 (1989) (I.D.) and the *Supplemental Initial Decision*, 6 FCC Rcd 2247 (1991) (S.I.D.) of Administrative Law Judge Joseph Chachkin (ALJ), as well as the exceptions and replies thereto of the captioned parties. Oral Argument was heard before the Board on September 6, 1991.

2. 47 U.S.C. § 309(e) (1991) provides that "If . . . a substantial and material question of fact is presented . . . [the application] shall [be] formally designate[d] . . . for hearing on the grounds or reasons then obtaining . . . ." Further, the disputed fact(s) "must be clearly and adequately alleged . . . and must rise to the level of a substantial and material issue." *California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 674 (D.C. Cir. 1985); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394-395 (D.C. Cir. 1985); *see also David Ortiz Radio Corporation v. FCC*, No. 90-1412, slip op. (D.C. Cir. August 20, 1991). Here, we find that there are substantial and material questions raised concerning the basic qualifications of the winner below, Peebles Broadcasting Company (Peebles), and a possible close competitor, Interactive Media (Interactive). Therefore, before this proceeding can be resolved, it will be necessary to remand this case to the ALJ for further hearings and the issuance of a Further Supplemental Initial Decision.

PEEBLES BROADCASTING CO.

3. *Financial Qualifications:* Peebles was determined by the ALJ to be the comparatively superior applicant and was awarded the construction permit at contest in the I.D. and S.I.D. However, several competing applicants except to the ALJ's failure to add a financial issue against Peebles. More specifically, during the course of the hearing proceeding below, the ALJ ordered Peebles to submit a copy of the "bank letter" it had initially relied upon in affirmatively certifying its financial qualifications at the time it filed its application. Tr. 234-237, 259. The record discloses that this letter (Dawson Exh. 7) from the Mechanics and Farmers Bank, Raleigh, North Carolina, dated July 3, 1986, merely provided as follows:

> Dear Mr. Peebles:
>
> Thank you for contacting us to review your request for a $85,000 line of credit loan for the radio station you are trying to obtain.
>
> We would be happy to consider the request subject to the loan being secured by real estate that would have at least a 75% loan to appraised value of the property offered.
>
> Thank you for your interest in Mechanics and Farmers Bank. We appreciate the opportunity to serve you.

4. In examining this bank letter, the ALJ opined that it clearly appeared to be "inadequate" (Tr. 294); nevertheless, following the hearing, Peebles submitted an entirely new letter in opposition to the pending motions to enlarge issues, specifying, *inter alia*, significantly different terms, including a new principal amount.[1] The ALJ accepted this subsequent Peebles letter as adequately demonstrating its financial qualifications and denied the enlargement of financial issues requests. *Memorandum Opinion and Order*, FCC 89M-652, released February 28, 1991.

5. Although an applicant need not have a binding written agreement to certify that it is financially qualified, *Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2d 594, 599-601 (D.C. Cir. 1978), the Commission does require a certification of such "reasonable assurance" of committed funding sufficient to construct the proposed facility and to operate for three months without revenue. The application form utilized by Peebles (*see* FCC Form 301, Instructions, Section III) contained the following guidelines:

> An applicant for a new station must certify that it has sufficient net liquid assets on hand or committed sources of funds to construct the proposed facility and operate for three months, without

> revenue. In so certifying, the applicant is also attesting that it can and will meet all contractual requirements, if any, as to collateral, guarantees, and capital investments.

Additionally, Questions 1 and 2 of Section III, FCC Form 301, clearly state:

> 1. The applicant certifies that sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue.
>
> 2. The applicant certifies that: (a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment or credit; (b) it can and will meet all contractural requirements as to collateral, guarantees, and capital investment . . . .

See Scioto Broadcasters, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 1893 (1991), *recon. dismissed*, 6 FCC Rcd 4626 (1991); *see also JAM Communications, Inc.*, 4 FCC Rcd 3754, 3757 (Rev. Bd. 1989).

6. In *Scioto*, the Board reiterated that in order to determine whether an applicant has "reasonable assurance" of "committed sources of funds," the following factors must be considered:

> [W]hether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi - State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms).

5 FCC Rcd at 5160-5161. We there found an applicant to be financially qualified where the institution upon which that applicant had relied for its certification of "committed sources of funds" had provided the applicant with documentation that:

> (1) identifies the borrower/applicant; (2) indicates the amount of the loan; (3) identifies the specific use of the proceeds of the proposed loan; (4) specifies a particular interest rate; (5) specifies terms of repayment; (6) identifies the specific collateral required; and (7) identifies specific conditions for final approval.

7. Here, however, the letter purportedly evincing Peebles' "committed funding" (1) is not addressed to the applicant entity; (2) does not identify a particular interest rate; and (3) does not specify terms of repayment. Additionally, the record is bereft of any indication that Peebles could actually provide sufficient real estate to meet the collateral requirements set forth by the bank. Taking the record facts in a light most favorable to the applicant, Mr. Peebles' "cousin Inez" is said to possess real estate with a value of $62,500; and Peebles' mother may possess real estate worth an estimated $23,000. Peebles claims both may pledge their real estate as collateral. However, by Peebles' own admission, their aggregate property is valued at only $85,500, which is patently insufficient to meet the "75% loan to appraised value" specified in the subject bank letter.[2]

8. Peebles argues that, even though its original bank letter may have been inadequate, it (and the ALJ) properly relied upon its subsequently-obtained bank letter because it merely "memorialized" so-called "earlier understandings between Peebles and the bank . . . ." (Peebles Reply Exceptions at 3). However, we note that this second letter (obtained almost three years after Peebles filed its application) bears little or no resemblance to the original letter Peebles initially relied upon, including nearly a 400% increase in the principal amount. *See supra*, note 1. Moreover, the Commission has made abundantly clear that a modified financial proposal cannot be relied upon in the absence of a showing that the applicant "had reasonable assurance of necessary financing at the time it filed its application." *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991); *see Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751 (1990) (applicant found not financially qualified where it failed to demonstrate "reasonable assurance" of a loan commitment from a bank at the time its application was filed). In light of the foregoing, the Board finds that substantial and material questions of fact are raised concerning Peebles' initial financial certification, and appropriate issues will be specified.

INTERACTIVE MEDIA

9. *Financial Qualifications:* Interactive also relied initially upon a letter from the Mechanics and Farmers Bank in affirmatively certifying its financial qualifications. That letter provided as follows:

> July 11, 1986
>
> Mr. Jim Lee, President
>
> Interactive Media, Inc.
>
> 130 Nelson Street
>
> Durham, N. C. 27707
>
> Dear Mr. Lee:
>
> Thank you for allowing Mechanics and Farmers Bank an opportunity to review your proposal for development of a new FM Radio Station in Raleigh, North Carolina. Based upon the preliminary information supplied to us, Mechanics and Farmers Bank would be pleased to consider further the financing of this project. It is our understanding that a loan of $150,000.00 would be needed to complete the funding requirements should Interactive Media, Inc. be awarded the license.

> As soon as you are able to provide us with a final package to include:
>
> 1) Current financials on Interactive Media, Inc., to include pro forma balance sheet, five year cash flow projections and profit and loss statement projections.
>
> 2) Final sources and funds usage statement.
>
> 3) Commitments or letters of interest from advertisers to cover 80% of first years sales projections.
>
> The bank will be in a position to offer a final commitment. It is our understanding that this would be a secured transaction and acceptable collateral would be offered to the bank. The loan term would be based on the collateral offered, but we feel that those outlined in your proposal are agreeable to us.
>
> We again thank you for allowing us the opportunity to consider this proposal.

10. The terms of this letter establish that it: (1) was prepared subsequent to the time Interactive affirmatively certified its financial qualifications; (2) does not specify any rate of interest; (3) does not specify any terms of repayment; (4) does not specify specific collateral requirements; (5) reveals that the bank did not review any current financial information of the applicant; and (6) is addressed to a *corporate* applicant. As with Peebles, the Board finds that substantial and material questions of fact concerning Interactive's initial financial certification must be examined at a further hearing to determine both the efficacy of the purported commitment and the good faith of Interactive's claimed reliance on this source of funding.

11. *Transmitter Site:* In its application as originally filed, Interactive claimed that it possessed "reasonable assurance" to construct a 258' steel, guyed tower on top of an existing 22' concrete building at the Quail Corners shopping center in North Raleigh, North Carolina. Interactive claims that it obtained such "reasonable assurance" from an owner of the shopping center (Dan C. Austin) "very late in the process," and just prior to filing its application. Austin was apparently contacted later by a competing applicant to verify Interactive's "reasonable assurance," and Austin disavowed that he ever gave permission to Interactive to erect a 258' tower on his building. Applicant Malloy subsequently filed a motion to enlarge issues in this regard. But, by *Memorandum Opinion and Order*, FCC 89M-825, released March 15, 1989, the ALJ declined to add the issues, stating (*id.*, at paras. 4-5; emphases added):

> With respect to a site availability issue Malloy submits the affidavit of Dan C. Austin, the owner of the shopping center. Austin recites that he has not authorized and is not willing to have a 258-foot guyed tower constructed on top of his shopping center. He states further that in 1986 he was contacted by Interactive principal James S. Lee regarding rental of studio space in the shopping center and placement of an antenna on the building; that he was never informed of the intention to place a 258 foot tower on top of his building; that he did not discuss the costs or terms of placing a tower on the building; that he believes he told Lee he would be willing to lease studio space and that he would consider the possibility of placing a small antenna on the building subject to being informed of the details of the proposal; and that he has not heard from Lee since 1986.
>
> Interactive's Further Opposition contains declarations of Lee and Austin. Lee states that in his conversation with Austin, he described the size of the tower to Austin and Austin responded that he did not believe a tower of that size, mounted on the roof, would be a problem structurally because the shopping center was designed to accomodate an additional two stories, which had not been constructed. [*Lee*] *states it is possible he did not mention the tower's exact height since the average terrain figures for the shopping center had not been calculated* . . . . Austin states in his declaration that he does recall speaking to Lee about the use of the shopping center as a transmitter site; that he has no recollection of the exact tower height mentioned by Lee, if Lee mentioned one; that he remembers Lee discussing lease payments and that he had no detailed recollection of his brief conversation with Lee; that it is possible he misunderstood Lee and vice versa; and that it is possible that Lee got the impression that the shopping center roof was available for his radio station tower. *Austin states, further, that he has not authorized a 258 foot tower and is not willing to have a radio tower in excess of 10 - 12 feet constructed on the roof.*

Subsequent to the submission of Austin's declaration and a follow-up conversation between Lee and Austin, Interactive conceded that it could not construct its tower as originally proposed. It then amended its application to specify a different site. This amendment was accepted by the ALJ by *Memorandum Opinion and Order*, FCC 89M-1078, released April 5, 1989.

12. An applicant need have only "reasonable assurance" that the transmitter site specified in its application will be available. *Mount Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462, 1463 (D.C. Cir. 1989). The standard, "a liberal one," is satisfied by:

> [S]ome clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated, and that he would give notice of any change of intention.

Elijah Broadcasting Corp., 5 FCC Rcd 5350, 5351 (1990).

13. In establishing the new site certification form to be appended to FCC Form 301, the Commission declared in its *Order* (*In the Matter of Amendment of Sections 73. 3572 and 73. 3573 Relating to Processing of FM and TV Broadcast Applications)*, 58 RR 2d 776, 782 (1985), that:

> [S]ite availability certification [should] be utilized to deter speculative applications . . . . The Commission has held that although an applicant need not necessarily go as far as to demonstrate absolute assurance, an applicant should be able to show some

reasonable assurance that the site for each proposed transmitting antenna is available. A mere possibility that a site will be available is not sufficient. *William F. Wallace and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974). Commission requirements will be satisfied when an applicant has contacted the property owner or owner's agent and has obtained reasonable assurance in good faith that the proposed site will be available for the intended purpose. Therefore, we are adding a question to FCC Form 301 which will require an applicant to certify that reasonable assurance has been obtained from the property owner that the site will be available.

14. Moreover, in adopting the specific disclosure requirements pertaining to site certification, the Commission was aware of chronic problems concerning the purported "reasonable assurance" of specified tower sites. While the applicant need not necessarily own the proposed site, nor even pay a significant consideration to purchase or lease in the future, and may even work out the exact terms for lease or ownership at some time in the future, *see National Innovative Programming Network, Inc.*, 2 FCC Rcd 5641 (1987), the Commission's "reasonable assurance" standard is not an empty stricture. *See Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985); *Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983), *rev. denied*, FCC 84-119, released April 2, 1984, *aff'd mem. sub nom. Royce International Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985)(table), *cert. denied*, 474 U.S. 995 (1985). It is clear that an applicant must possess "reasonable assurance" of the proposed site at the time of filing its application. *62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1771-1772 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 830 (1990); *Adlai E. Stevenson IV*, 5 FCC Rcd 1588 (Rev. Bd. 1990). And, although "reasonable assurance" may be acquired in numerous ways, there must be at least a meeting of the minds resulting in some firm understanding as to the site's availability. *Genesee Communications, Inc.*, 3 FCC Rcd 3595 (Rev. Bd. 1988); *see also Progressive Communications, Inc.*, 61 RR 2d 560 (Rev. Bd. 1986); *Dutchess Communications Corp., supra*, 101 FCC 2d at 253 (Rev. Bd. 1985). The record here appears to strongly suggest that there was no meeting of the minds between Lee and Austin, and they had no firm understanding whatsoever. Interactive's alleged "belief" simply will not alone suffice to establish "reasonable assurance." *See Progressive Communications, supra*, 61 RR 2d at 562. "Reasonable assurance," as defined many times by the Commission, is required. *William F. and Anne K. Wallace*, 49 FCC 2d 1424, 1427 (1974) (mere indication from site owner that he could "foresee no problem" in making site available is insufficient for "reasonable assurance"); *El Camino Broadcasting Corp.*, 12 FCC 2d 25 (1968) ("A mere possiblility that the site will be available will not suffice."). In light of the foregoing, an appropriate site availability issue will be specified.

15. Further, "the law is clear that an applicant will not be permitted to amend [to a new transmitter site] where it did not have the requisite reasonable assurance to begin with . . . ." *South Florida Broadcasting* Co., 99 FCC 2d 840, 845 n. 12 (Rev. Bd. 1984); *Classic Vision Inc.*, 104 FCC 2d 1271, 1273 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 2376 (1987); *see 62 Broadcasting, supra*, 4 FCC Rcd at 1773. And, no transmitter site amendment was, or is, permissible absent a showing of "good cause" as set forth in 47 CFR § 73.3522.[3]

16. ACCORDINGLY, IT IS ORDERED, That this proceeding is remanded to the Presiding Officer for further hearings, and the preparation of a Further Supplemental Initial Decision, on the following issues:

1. To determine whether Peebles Broadcasting Company was financially qualified at the time it filed its application, and the effect thereof on its basic qualifications.

2. To determine whether Peebles Broadcasting Company misrepresented facts or lacked candor in certifying its financial qualifications at the time it filed its application, and the effect thereof on its basic qualifications.

3. To determine whether Interactive Media was financially qualified at the time it filed its application, and the effect thereof on its basic qualifications.

4. To determine whether Interactive Media misrepresented facts or lacked candor in certifying its financial qualifications at the time it filed its application, and the effect thereof on its basic qualifications.

5. To determine whether Interactive Media possessed reasonable assurance of the availability of its initial transmitter site at the time it filed its application, and the effect thereof on its basic qualifications.

6. To determine whether Interactive Media misrepresented facts or lacked candor in certifying the availability of its initial transmitter site at the time it filed its application, and the effect thereof on its basic qualifications.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] This later letter, dated January 13, 1989, from the Mechanics and Farmers Bank, provides as follows:

Dear Mr. Peebles:

The purpose of this letter is to confirm our conversation concerning your request to borrow funds from Mechanics and Farmers Bank to cover the costs of construction and initial operation of a new FM radio station you propose to construct at Raleigh, North Carolina. In the event your application to the Federal Communications Commission for permission to construct and oeprate the station is granted, we will be willing to make a loan to you or a corporation owned by you in the amount of up to $325,000 on the following conditions:

1. No repayments of principal would be required until the station has been in operation for at least six months and equal monthly payments of interest and principal will be required thereafter over a period of five to ten years. Interest today will be 11.00% per annum.

2. The loan would be collateralized by assets of the station or other assets meeting our requirements for a loan of this type. We believe that the assets of a Raleigh, North Carolina FM radio station and collateral of you and Inez Peebles, will be adequate to secure a loan of this type.

3. Before the loan funds could actually be advanced, you would be required to file a formal application and meet all of the requirements of our bank at that time for a loan of this type.

This letter merely confirms our understanding set out in our July 3, 1986, letter and supplies details which were the subject of our oral conversations.

We look forward to doing business with you and strongly support your efforts to establish a minority owned FM radio station in Raleigh.

[2] In its Exceptions (at para. 10), Interactive notes:

Mr. Peebles testified that the "Cousin Inez certification" was a representation to a bank that she would pledge $62,500 of real estate as collateral for a loan to Peebles Broadcasting Company. The testimony in that regard is not credible; the "Cousin Inez certification" is a document that speaks eloquently for itself. On its face, the certification is an undertaking by Ms. Inez Peebles to contribute $63,000, not as a guarantee of collateral, but "for the purpose of applying for an FM station in Raleigh, North Carolina with Millard R. Peebles, Jr." On its face, the document relates to payment for filing and prosecution of the application. Mr. Peebles drafted that document. Had he wanted it to be a guarantee of collateral, he was capable of saying so. If he wanted Ms. Inez Peebles to have another role -- as funding source for construction and operation, collateral maker, guarantor or otherwise -- the document he drafted likewise would have so stated.

With respect to the property valued at $23,000, Interactive notes that Peebles first testified at hearing that he was pledging his own real estate. Tr. 262. However, in response to a question concerning real property owned by him, Peebles admitted that he did not, in fact, own any real estate whatsoever prior to 1988. Tr. 289. He then admitted it was his mother's property, and that there was an "oral agreement" that this real estate would be encumbered to meet the bank's collateral requirements. Id. It is interesting to note that Peebles does not attempt to refute (indeed, does not even address) any of these allegations in its exceptions or reply exceptions.

[3] In its amendment to specify a new site, Interactive attempted to demonstrate that it had complied with *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970), and the "good cause" test set forth therein for post-designation amendments:

(1) the amendment was pursued with due diligence;

(2) it was not required by the voluntary act of the applicant;

(3) it will not necessitate modification or addition of issues or parties;

(4) it will not disrupt the orderly conduct of the hearing or necessitate an additional hearing;

(5) it will not unfairly prejudice the other parties; and,

(6) it will not cause the applicant to gain a comparative advantage.

Additionally, Interactive also claimed that it had also complied with the additional provisions of 47 CFR § 73.3522(b)(1) for post-designation engineering amendments. That section of the Commission's Rules provides:

(1) . . . [R]equests to amend an application after it has been designated for hearing will be considered only upon . . . a showing of good cause for late filing. In the case of requests to amend the engineering proposal (other than to make changes with respect to the type of equipment specified), good cause will be considered to have been shown only if, in addition to the usual good cause consideration, it is demonstrated:

(i) That the amendment is necessitated by events which the applicant could not reasonably have foreseen (*e.g.*, notification of a new foreign station or loss of transmitter site by condemnation); and,

(ii) That the amendment does not require an enlargement of issues or the addition of new parties to the proceeding.

While the ALJ accepted Interactive's amendment, substantial questions are raised by the record before us as to whether Interactive could have met the "unforeseeability" test of 47 CFR § 73.3522(b)(1)(i).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ONE CALL
COMMUNICATIONS, INC.
Complainant,

v. File No. E-91-001
AT&T COMMUNICATIONS OF
INDIANA, INC.,
Defendant.

ORDER

Adopted: September 30, 1991; Released: October 15, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 28, 1990, One Call Communications, Inc. (One Call), filed the above captioned formal complaint which alleged that defendant, AT&T Communications of Indiana (AT&T) was engaging in violations of Sections 201 and 202 of the Communications Act, 47 U.S.C. §§ 201 and 202, by providing services under Tariff 16 to several colleges and universities, some of which, it was alleged, were not governmental institutions. AT&T denied liability for the conduct alleged in the complaint. By joint motion filed September 27, 1991, the parties advised the Commission that they had reached a mutually satisfactory settlement and requested that the complaint be dismissed with prejudice.

2. We are satisfied that dismissal of this complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion for dismissal of the above-captioned complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LDDS OF INDIANA, INC.
Complainant.

v. File No. E-91-002
AT&T COMMUNICATIONS OF
INDIANA, INC.,
Defendant.

ORDER

Adopted: September 30, 1991; Released: October 15, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 1, 1990, LDDS of Indiana, Inc. (LDDS), filed the above captioned formal complaint which alleged that defendant, AT&T Communications of Indiana (AT&T) was engaging in violations of Sections 201 and 202 of the Communications Act, 47 U.S.C. §§ 201 and 202, by providing services under Tariff 16 to a non-governmental entity. Defendant denied all liability for the conduct alleged in the complaint. By joint motion filed September 27, 1991, the parties advised the Commission that they had reached a mutually satisfactory settlement and requested that the complaint be dismissed with prejudice.

2. We are satisfied that dismissal of this complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion for dismissal of the above-captioned complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-80

In re Applications of

PETER JOSEPH DEVLIN File No. BPH-880216MS
and PATRICIA EVE DEVLIN

EARL J. BROOKER File No. BPH-880217ML
and CAROL L. BROOKER
d/b/a BROOKER BROADCASTING

For Construction Permit for a
New FM Station on Channel 282A (104.3 MHZ)
in Seymour, Wisconsin

Appearances

Christopher J. Reynolds, Esq., on behalf of Peter Joseph Devlin and Patricia Eve Devlin; *John S. Neely, Esq.* and *Jerrold D. Miller, Esq.*, on behalf of Earl J. Brooker and Carol L. Brooker d/b/a Brooker Broadcasting; and *Larry A. Miller, Esq.*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: October 7, 1991; Released: October 15, 1991

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Peter Joseph Devlin and Patricia Eve Devlin ("Devlin") and Earl J. Brooker and Carol L. Brooker d/b/a Brooker Broadcasting ("Brooker") for a construction permit for a new FM broadcast station on Channel 282A in Seymour, Wisconsin.

2. The *Hearing Designation Order* ("*HDO*") also designated for hearing the applications of Ms. Kim M. Gulseth d/b/a Muffy's Radio Company and Gregory D. Sauve and Patricia A. Sauve d/b/a Seymour FM Broadcasting. However, those applications were subsequently dismissed with prejudice prior to the commencement of the hearing.

3. The Commission designated the following issues:

> To determine which of the proposals would, on a comparative basis, best serve the public interest; and
>
> To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted.

4. By *Memorandum Opinion and Order*, FCC 90M-2690, released August 27, 1990, the following issues were added:

> To determine whether Peter Joseph Devlin and Patricia Eve Devlin have reasonable assurance of the availability of a transmitter site;
>
> To determine whether or not Peter Joseph Devlin and Patricia Eve Devlin are financially qualified to construct and operate their proposed station for three months without revenues, and if not, to determine the effect thereon on its basic qualifications to be Commission licensees, and
>
> To determine whether or not Peter Joseph Devlin and Patricia Eve Devlin engaged in misrepresentations in certifying as to its financial qualifications, and if so, to determine the effect thereon, on its basic qualifications to be Commission licensees.

FINDINGS OF FACT

Basic Qualification Issues

Site Availability Issue - Devlin

5. Peter Devlin testified that he first learned of the unavailability of his proposed transmitter site when he telephoned Mrs. Philipsen on July 24, 1990 and was advised by her that the land was being sold to the Oneida Tribe of Indians of Wisconsin (Tr. 213, 217, 219). Mrs. Philipsen referred Devlin to the Oneida Tribe's Land Director, Christine Doxtator, whom he telephoned in order to resecure reasonable assurance of the availability of the transmitter site. Devlin explained that he had had an agreement to purchase five acres of land on the Philipsen's farm for the FM transmitter site and that in view of the pending purchase of the Philipsen farm by the Oneidas, he would like to begin negotiations for leasing the same five acres from the Tribe. Although he had proposed to purchase the land from the Philipsens, he knew that the Oneidas policy was to re-acquire original tribal land, such as the Philipsen property, and thereafter to enter into long-term leases. He expressed his interest in leasing on a long-term basis the same five acre plot from the Oneida Tribe advised by Ms. Doxtator that such an agreement would have to await finalization of the purchase of the property from the Philipsens (Phase II Hrg., Devlin Exh. 10, p. 1; Tr. 219-221).

6. As soon as the land purchase had been finalized, on or about August 10, 1990, Peter and Patricia Devlin were invited to make a presentation to a meeting of the Oneida Tribe's Land Committee on August 13, 1990. At the meeting, Devlin explained the need to acquire land on which he could erect a radio tower and identified the five acre parcel in the northwest corner of the Philipsen farm which he proposed to use for that purpose. He supplied the committee with a copy of the engineering portion of his application (Tr. 221-223). A week later, Devlin received a copy of the meeting minutes by which he was informed that the proposal to locate the radio tower on the originally-proposed Philipsen farm had been approved by the Land Committee (Phase II Hrg., Devlin Exh. 10, p. 1; Tr. 224).

7. Loretta V. Metoxen, Treasurer of the Oneida Tribe and a member of the Business Committee, testified that the August 13 recommendation of the Land Committee

had been passed on to the Business Committee for final approval but that that decision awaited an environmental impact assessment and formal recommendation from the Tribes legal office (Tr. 236-237). She stated that the Business Committee attaches great weight to the recommendations of the Land Committee and "nearly all of their recommendations are approved." (Tr. 237). She was aware of no objections to the Devlin proposal to use the Oneida Tribe's newly acquired land for its transmitter site (Tr. 238). Although the decision to make land available to the Devlins is not yet a binding commitment, Ms. Metoxen believes that the Land Committee recommendation "conveys reasonable assurance of the availability of the site for the requested use." (Phase II Hrg., Devlin Exh. 10, Att. 1; Tr. 240).

8. Ms. Metoxen stated that there were no other conditions attached to the Devlins' use of the land and that the amount of the lease payments would not exceed market value and would be negotiated at the time of final Business Committee approval (Tr. 241-242). Other arrangements such as the provision of electricity, the building of fencing and access roads will also be negotiated at that time (Tr. 242-245). There are no restrictions on the shape of the property and the use of the five acre parcel as a transmitter site does not conflict with the use of the rest of the Philipsen land (Tr. 247-2 50). The Philipsen property had been farmed for years and the farmer had access to the five acre parcel which Devlin proposes to lease (Tr. 227, 245).

Financial and Misrepresentation Issues - Devlin

9. Before filing the Devlin application, Peter Devlin prepared an estimate of projected pre-startup expenses as follows:

Tower (used)	$ 60,000
Tower erection	30,000
Transmitter land	10,000
Transmitter building	20,000
Transmitter	40,000
Transmitter wiring	10,000
Studio Equipment	40,000
Studio Installation	12,000
STL	12,000
Office Equipment	10,000
3 Mos. Operating Expense	116,700
Contingency Funds	36,000
Miscellaneous	3,300
TOTAL	$ 400,000

(Phase II Hrg., Devlin Exh. 8, p. 1; Atts. 2, 3; Tr. 254).

10. Devlin calculated the various categories of construction expenses based on his broadcast experience and particularly his experience preparing similar financial data for WNFL/WKFX in Green Bay. The prices of equipment were calculated from figures listed in various electronic supply company catalogues and conversations he had had with knowledgeable individuals about the prices of such equipment as a tower and emergency generators. He increased his estimates by 10 percent to allow for contingencies and miscellaneous expenses (Phase II Hrg., Devlin Exh. 8, pp. 1-2).

11. To meet projected construction and first three months operating expenses totalling $400,000, Devlin relies upon a letter of February 12, 1988 from Valley Bank in Green Bay, Wisconsin. That letter states in relevant part as follows:

> Valley East Bank in Green Bay, WI, is pleased to advise you that, having reviewed your plans for an FM radio station and your request for financing, we are willing to lend you four hundred thousand dollars ($400,000), subject to the following terms and conditions. We understand that these funds will be utilized to construct and operate the new FM radio station in Seymour, WI.
>
> (1) Peter J. & Patricia E. Devlin are successful in obtaining approval from the Federal Communications Commission (FCC) to construct and operate a FM radio station in Seymour, WI.
>
> (2) All reasonable and ordinary credit criteria of our bank are met at such time as Peter J. & Patricia E. Devlin (a) has received from the FCC the construction permit for the proposed radio station; and (b) requests from our bank a formal lending commitment approved by our lending committee.
>
> While the pricing and terms of amortization of any loan commitment will, of course, be contingent upon the exact credit conditions prevailing at the time of such commitment, we contemplate calculating interest on any loan made, at the rate of two percent (2.00%) above Milwaukee Bank's base lending rate plus 1 1/2 points. For your information, our bank's base lending rate is presently 8.50%. Any loan made will be repaid according to the terms and conditions set forth at the time of formal request.

(Phase II Hrg., Devlin Exh. 8, Att. 3).

12. On February 11, 1988, Mr. Devlin went to the Valley Bank in Green Bay, WI, to seek a funding commitment for the proposed station (Tr. 298). He presented the budget and other plans for the operation of the proposed Seymour station to Lee Hietpas, Vice President and Branch Manager of the Bank (Tr. 279, 296-298). The Devlins were customers of that bank and from time-to-time had borrowed money from it; no previous loan had exceeded $10,000, however (Tr. 287-288, 305-306). Mr. Devlin requested a loan commitment letter specifying $400,000, to be amortized over a period of 15 years with an interest rate of 10 percent (Phase II Hrg., Devlin Exh. 8, Att. 1; Tr. 304-305). Mr. Devlin requested that the bank furnish him a letter along the lines of a draft sent to him by his communications counsel (Tr. 279-280). Because Hietpas was aware the Devlins were customers of the bank and that the prospective loan was an opportunity for the bank to receive income from the loan, if made, Hietpas agreed to furnish the Devlins with a letter, using the draft supplied to him as a guide (Tr. 324).

13. According to Mr. Devlin, Mr. Hietpas also explained in general terms how the loan would be made. He explained that the Devlins would be required to provide 10 percent of the funds required for start-up and operation of the radio station and that such expenditures as fees for the FCC application, attorneys and engineers and related expenses would be considered a part of the 10 percent (Tr. 288-290).

14. Mr. Hietpas indicated to Devlin that the Valley Bank would act as an agent for the Wisconsin Business Development Loan ("WBDL") program which would lend half of the amount Devlin anticipated would be required to construct and begin operation of the radio station. Mr. Devlin did not discuss his financing needs with a representative of the WBDL program until after the release of the *HDO* and no assurance of funds was obtained (Phase II Hrg., Devlin Exh. 8, pp. 9-10).

15. After reviewing the spread sheets Devlin had provided, Mr. Hietpas selected those which he felt were necessary to establish a file on Devlin's application and returned the rest to Devlin. He also retained the model bank letter drafted by Devlin's attorney. Mr. Hietpas did not ask for any other documentation. He indicated that he would have a secretary type the letter, with changes he felt were appropriate, on Valley Bank stationery (Phase II Hrg., Devlin Exh. 8, pp. 7-8).

16. Mr. Hietpas does not recall whether he mentioned the desirability of a co-signor or third party guarantor at the meeting, although he assumed that it would be necessary for the Devlins to have such backing (Tr. 306). Devlin advised Hietpas that "he had someone in mind" either during the meeting or sometime shortly thereafter (Tr. 306-308, 317).

17. Mr. Hietpas advised Devlin that the bank loan committee would have to have sufficient information on security, collateral and repayment capacity before the final loan approval would be forthcoming (Tr. 308-309).

18. Mr. Hietpas did not discuss specific collateral requirements with Devlin, although he expected and told Devlin that collateral would be required. Collateral would be determined at the time the formal loan commitment application was considered (Tr. 311-312, 317). Hietpas could not remember discussing the requirement that the Devlins would be required to fund 10 percent of the anticipated expenses out of their own resources. The bank now normally "in most cases" requires a 20 percent "down payment." (Tr. 313-314).

19. At the Phase II hearing, Mr. Devlin admitted he did not have any understandings with anyone to guarantee the $400,000 loan and that he had no collateral to secure the loan, other than the station equipment to be purchased (Tr. 291-292).

20. Repayment terms, although not spelled out in the February 12 letter, were discussed between Hietpas and Devlin. Hietpas' notes on the loan summary showed an amortization period of 15 years and monthly payments of $4,300 (Tr. 322-323; Phase II Hrg., Devlin Exh. 8, Att. 1). The term and amount of payments could vary depending on the collateral guarantee (Tr. 329, but if a formal loan application had been submitted in February 1988, the terms would have been those noted on Mr. Hietpas' records (Tr. 331)).

COMPARATIVE ISSUE

Peter Joseph Devlin and Patricia Eve Devlin

21. The applicant is comprised of two individuals Peter J. Devlin and Patricia E. Devlin. Each individual has a one-half interest in the applicant. The Devlins are husband and wife, though estranged. Upon grant of their pending divorce, the Devlin's will continue their participation in the applicant with each individual maintaining equal ownership of the applicant (Devlin Exh. 1; Tr. 57-59, 104).

22. Mr. Devlin learned of the availability of the Seymour channel on the Wednesday immediately before the February 17, 1988, application filing deadline. He discussed the possibility of filing an application with Mrs. Devlin on the very same day (Tr. 61, 74, 94-95). Mrs. Devlin encouraged her husband to file the application because of her confidence in his 22-23 years experience as a broadcaster and because he knew how to put a radio station on the air and run it (Tr. 96). She agreed to join the application because the opportunity was a good way to further her career possibilities, the station would be a good family-based operation, and because Mr. Devlin had "expertise" in the radio area (Tr. 62).

23. Mr. Devlin retained the consulting engineer, although Mrs. Devlin had also spoken with the consulting engineer (Tr. 66). Mr. Devlin also retained counsel (Tr. 98). The Devlins prepared the application working from a blank form (Tr. 98). Mrs. Devlin assisted Mr. Devlin with the preparation of the application and the construction and initial operations estimates and budget (Tr. 67-70, 77, 79, 97). The Devlins share the expenses of the application on an equal basis (Tr. 53-54, 98, 103-04).

24. *Diversification.* The Devlins have no interest in any medium of mass communications (Devlin Exh. 4).

25. *Auxiliary Power.* The Devlins will use auxiliary power generators at the transmitter and studio sites so as to permit continued operations during emergencies and commercial power outages (Devlin Exh. 5).

26. *Integration.* Peter J. Devlin, a one-half owner of the applicant, will be integrated into the proposed station's day-to-day management and operations as Operations Manager. Mr. Devlin will devote a minimum of 40 hours per week to his duties in this position which will include scheduling and supervising air staff; establishing programming and news policies; and supervising and assisting in the gathering, writing, and on-air disseminating of the news and information elements of station programming (Devlin Exh. 2, p. 1; Tr. 49-51, 76). Should Devlin be granted the construction permit, Mr. Devlin will resign from any position of employment that he may have at that time in order to effectuate his integration commitment (Devlin Exh. 2, p. 1).

27. Mr. Devlin has continuously resided within the service area since April, 1975. Mr. Devlin will move to a residence within the 3.16 mV/m contour upon the grant of the Devlins' application (Devlin Exh. 2, p. 1-2).

28. Mr. Devlin has broadcast experience. He was employed as news director, news announcer, and air personality of WNFL/WKFX Radio, Green Bay, from March 1975 to July 1990. From May 1972 to March 1975, Mr. Devlin served as the News Director for WIBU/WLVE Radio, Poynette/Baraboo/Madison, Wisconsin. From January 1970 to April 1972, Mr. Devlin was News Director at WRSC/WQWK Radio at State College, Pennsylvania. From April 1968 to January 1970, he was the News Director for WBVP-AM/FM, Beaver Falls, Pennsylvania. Mr. Devlin was an air personality for WPVA Radio, Petersburg, Virginia from September 1967 to February 1968. From June to September 1966, Mr. Devlin was a part-time announcer at WFBS Radio, Spring Lake, North Carolina, while stationed at Fort Bragg. Prior to his military service, Mr. Devlin was an air personality for WBOY

Radio and Television, Clarksburg, West Virginia from September 1965 to November 1965. From 1968 to 1970, Mr. Devlin also worked part-time and as a "stringer" for KDKA, Pittsburgh, Pennsylvania; KQV, Pittsburgh, Pennsylvania, WIXZ Radio, McKeesport/Pittsburgh, Pennsylvania; and WASP Radio, Brownsville, Pennsylvania. Mr. Devlin was awarded the Wisconsin Associated Press "Newsman of the Year" Award in 1976 and was President of the Wisconsin Associated Press Broadcasters in 1980-81 (Devlin Exh. 2, pp. 2-3).

29. Mr. Devlin is civically active in the Green Bay area encompassed by the proposed station's 1.0 mV/m contour. His service area civic activities include the following: Mr. Devlin has been a member of the Bellevue/East Town Optimist Club of Green Bay since April 1984, and a Life Member of Optimists International since 1988. He served as President of the local club from October 1986 to September 1987, and has been a member of the club's Board of Directors since 1985. Under his leadership, the club adopted a "Just Say No" anti-drug program, financed a "Just Say No" Club at a local school, St. Philip the Apostle, and sponsored the Edison Middle School football team of the Green Bay School District (Tr. 88-89). The club also sponsored Boy and Girl Scouts troops, youth sports activities, and awards scholarships and other academic recognitions to area students. Mr. Devlin currently serves as Lieutenant Governor of the Wisconsin/Upper Michigan District of Optimists International since October 1989, and was the District's Publicity Chairman from October 1987 to September 1989 (Devlin Exh. 2, pp. 3-4).

30. From October 1987 to September 1989, Mr. Devlin was a member of the Board of Directors of Bay Area Optimists, Inc., a non-profit consortium of 13 Optimists Clubs in the Green Bay area. The consortium produces the annual Fox RiverFest to raise funds for Optimist Club youth projects. Mr. Devlin served as Entertainment Chairman for the festival in 1988, as an announcer for the event in 1989, and as Chairman of the sound system committee for the event in July, 1990 (Devlin Exh. 2, p. 4).

31. Mr. Devlin is a member of Vietnam Veterans of America, Chapter 224, in Green Bay. He was awarded life membership in the organization in January 1990, in recognition of his continued service to the Chapter, including his provision of a public address system for Memorial Day and P.O.W./M.I.A. Awareness Day ceremonies in Green Bay to promote public awareness of Vietnam veterans' issues (Tr. 89-92). Mr. Devlin is also a member of the Veterans of Foreign Wars Post in Green Bay (Devlin Exh. 2, pp. 4-5).

32. Mr. Devlin was President of the Ancient Order of Hibernians in Green Bay in 1986 and 1987. He served as Clubmaster of Pack 4102 in Green Bay from September 1983 to June 1986. From September 1982 to August 1983, he was the Tiger Cub Coordinator for the Pack. From September 1986 to October 1987, Mr. Devlin served as a member of the committee of Boy Scout Troop 1102 in Green Bay and its Scoutmaster from September 1977 to May 1978. Mr. Devlin was Scouting Chairman of the Brown, Door, Kewaunee County District of the Bay-Lakes Council of the Boy Scouts of America in 1976 and 1977 (Devlin Exh. 2, p. 5).

33. Mr. Devlin has served as the volunteer Media Coordinator for the state courts in Wisconsin's Eighth Judicial Circuit (encompassing Brown, Door, Kewaunee, Marinette, Oconto, Outagamie, and Waupaca Counties) since 1982. He served as Master of Ceremonies for the Green Bay Packer Wives annual fashion show to benefit Muscular Distrophy in 1983 and 1984, and assisted in the show's production in 1985 and with publicity for the show every year since 1980 (Devlin Exh. 2, p. 5).

34. In the years 1984-89, Mr. Devlin was involved in the planning, promoting and broadcasting of the American Cancer Society's annual "Jail'n'Bail" fundraiser in Green Bay. In 1984, he served on the publicity committee for Green Bay's Heritage Festival. In 1983 and 1984, he co-hosted a radio auction that raised funds for Salvation Army Food Distribution and Toys for Tots in Green Bay (Devlin Exh. 2, p. 6; Tr. 93).

35. In 1987 and 1988, Mr. Devlin participated in several local food drives. In 1984, he donated his time and talent to research, write and produce narrations for displays at the National Railroad Museum in Green Bay. In the years 1986-89, he assisted in publicity and fundraising efforts on behalf of Green Bay's Neville Public Museum (Devlin Exh. 2, p. 6).

36. From 1976 to 1979, Mr. Devlin was a licensed foster care provider and provided foster care to several children in Green Bay. He also served as a local host for children from Belfast, Northern Ireland in 1985 to 1987. Mr. Devlin is a blood donor and a member of the American Red Cross Blood Bank in Green Bay (Devlin Exh. 2, p. 6).

37. Mr. Devlin has also been civically active in the community of Seymour, within the 3.16 mV/m contour. Mr. Devlin assisted in collecting donated equipment and personally donated sound recordings to the Seymour High School Broadcasting program. Since 1981, Mr. Devlin has emceed an annual Spring assembly at the Seymour Middle School (Devlin Exh. 2, pp. 6-7; Tr. 107).

38. *Patricia E. Devlin*, a one-half owner of the applicant, is proposed to be integrated into the station's day-to-day management and operations as General Manager and Business Manager. Mrs. Devlin will devote a minimum of 40 hours per week to her duties in these positions which will include overseeing all financial aspects of station operations, sales efforts, program and commercial scheduling, and supervision of the entire station staff. She will also make all hiring and firing decisions and implement the station's Equal Employment Opportunity Program (Tr. 38-51), 76, 102-03). Mrs. Devlin is currently employed by Hydroclean Equipment, Inc. (Tr. 34-35). Should the Devlins' application be granted, Mrs. Devlin will resign from this position in order to effectuate her integration commitment (Devlin Exh. 3, p. 1).

39. The Devlins decided upon their positions at the station on a joint basis (Tr. 76). Since Mr. Devlin had the bulk of the actual broadcast experience, it was decided that he would be the station's operations manager. Mrs. Devlin's experience is of a more general nature. It was thought that her general business and people skills, accompanied by her experience in leadership, supervision and oversight of budgetary matters earned in her various volunteer positions suited her to be the station's general manager and business manager (Tr. 76-77, 105-06).

40. Mrs. Devlin is a long-term resident of the Green Bay area within the service area of the Devlins' proposed station. Mrs. Devlin currently resides at 2216 Manitowoc Road, Green Bay, Wisconsin (Tr. 20). Upon the grant of the Devlins' application, she will move to a residence within the 3.16 mV/m contour. Mrs. Devlin has resided at

her current address since November 1978. From April 1975 to November 1978, she resided at 1786 Keehan Lane, Bellevue (Devlin Exh. 3, 1).

41. Mrs. Devlin was unemployed from 1979-89 (Tr. 37, 38). Prior to 1979 she was employed as a secretary (*Id.*). Her employment since she returned to the work force at Hydroclean Equipment, Inc. has been as a part-time secretary.

42. Mrs. Devlin is civically active in the Green Bay area encompassed by the proposed station's 1.0 mV/m contour. Mrs. Devlin has served as a Girl Scout Leader in Green Bay since 1985. Mrs. Devlin is also Service Unit Chairman for approximately 30 area Girl Scout Troops. She also served in this capacity in 1986 and 1987. From 1986 through 1989, Mrs. Devlin served as Girl Scout Recognition Chair and organized recognition banquets, chaired the committee to select recognition recipients, organized and chaperoned dances and parties, and participated in a parade and bake sale. Mrs. Devlin has been Leader Trainer from 1987 to the present. In recognition of her service, the Lac Baie Girl Scout Council awarded Mrs. Devlin the Special Volunteer Pin, the Ten Year Pin, the Outstanding Leader Pin, and the Lac Baie Council Appreciation Award (Devlin Exh. 3, p. 2; Tr. 37, 71-72).

43. Mrs. Devlin has also been an active volunteer with the area Boy Scouts from 1981 to 1988. She served as a Den Leader for Cub Scout Pack 4102 in Green Bay in 1981-82, and as the Pack's Committee Chairman in 1983-84, and as Fundraising Chairman from 1985 through 1987 (Devlin Exh. 3, p. 2; Tr. 72).

44. Mrs. Devlin was a member of the Bellevue-East Town Optimists Club of Green Bay from 1987 to 1988. Mrs. Devlin was an active participant in the club's activities including the following 1987 activities. Chair of Placemat Sales and Chair of Games Committee for the Chili Cook-off, Chair of Toys for Needy Children Program, and delivered toys to the Hmong Association. Mrs. Devlin also participated in the annual Optimist Club Chili Cook-off events in 1984 through 1988. In 1988, Mrs. Devlin was Chair of the Arts and Crafts Committee and a member of the Planning Committee for the Fox RiverFest. Also in 1988, she served as organizer of and advisor to the affiliated Junior Optimist Club of Green Bay. Mrs. Devlin was elected incoming Vice President of the Optimist Club in 1988 (Devlin Exh. 3, pp. 2-3; Tr. 72-73).

45. Mrs. Devlin was active in Toys for Tots campaigns in Green Bay from 1982 to 1983. She served on the advisory board of the Happy Hour Nursery School from 1986 to 1988, where she was involved in setting policy and establishing the budget. Mrs. Devlin also served as the school's fundraising chair from 1986 to 1988 (Devlin Exh. 3, p. 3; Tr. 73, 77, 79).

46. Mrs. Devlin served as a youth bowling coach from 1982 to 1985 in Green Bay. From 1976 to 1979, Mrs. Devlin was a licensed foster care provider and provided foster care to several children in Green Bay. She also served as a host for children from Belfast, Northern Ireland from 1985 to 1987. Since 1975, Mrs. Devlin has been a blood donor and a member of the American Red Cross Blood Bank in Green Bay. Mrs. Devlin is certified in emergency first aid and C.P.R. since 1987 and attended suicide prevention and chemical abuse workshops in 1988 (Devlin Exh. 3, pp. 3-4; Tr. 29).

47. In 1988, Mrs. Devlin participated in an area Read-a-thon at a local shopping center with children from the Eisenhower School. In 1986 and 1987, she assisted the running of the children's Christmas Shop at the Eisenhower School and, in 1989, chaperoned the Jump Rope for Heart event at the school. She assisted in covering books at St. Philip's School in 1986 (Devlin Exh. 3, p. 4).

48. The Devlins claim comparative credit for Patricia Devlin's female status (Devlin Exh. 3).

Brooker Broadcasting

49. Brooker Broadcasting is a general partnership currently consisting of two general partners: Earl J. Brooker with a 51 percent interest and his wife, Carol L. Brooker, with the remaining 49 percent (Brooker Exh. 1; Devlin Exh. 6; Tr. 49). Brooker's application was originally filed by Earl J. Brooker d/b/a Brooker Broadcasting, as a sole proprietorship (Tr. 175). The application was amended on the cut-off date for amendments as of right in this proceeding, June 6, 1988, to report the applicant's change from a sole proprietorship to a general partnership including Carol Brooker (Tr. 176).

50. In addition to being an applicant for the Seymour channel, Earl J. Brooker d/b/a Brooker Broadcasting has been in business since 1977 as a sole proprietorship providing DJ services for weddings and other such functions (Tr. 135-36, 174-75). The original Brooker application was prepared by Earl Brooker with the assistance of a friend, Steve Brown (Tr. 161-62). Carol Brooker had no involvement in the preparation of the application (Tr. 133-34). In June, 1988, subsequent to the filing of the application, Earl Brooker approached his wife about becoming a partner in the applicant (Tr. 122-23, 127). At that point, the Brookers were familiar with the fact that all of their opponents had proposed full or partial female ownership (Tr. 123-24, 180-81).

51. Earl Brooker then amended his application on the "B" cut-off date to change the applicant from a sole proprietorship to a general partnership including Carol Brooker. By the same amendment, Brooker, for the first time, certified to its financial qualifications. Carol Brooker had no involvement in the applicant's efforts to ascertain its financial qualifications or to obtain reasonable assurance of funding. She did not participate in the formulation of a budget, the estimation of construction and operation expenses, or in meeting with the bank and getting a loan letter therefrom (Tr. 128, 133, 165).

52. In the first days of June, 1988, when Carol Brooker first considered joining her husband's application, she contemplated being involved therein only as a general partner and not as a manager of the proposed facility (Tr. 128). Her integration into the management of the proposed station was not contemplated until a much later point -- March 1990 -- when integration statements were due to be filed in the proceeding (Tr. 127-28).

53. The Brookers maintain that Brooker Broadcasting, the general partnership and amended FM applicant, is a wholly separate entity from Brooker Broadcasting, the sole proprietorship of Earl Brooker (Tr. 136, 177). The general partnership entity, however, has never been registered with the State of Wisconsin (Tr. 178). No tax schedule has been filled out for the general partnership (Tr. 179). The two Brooker Broadcasting businesses share the same checking and savings accounts (Tr. 136, 177). The

funds of both businesses are, in fact, co-mingled (Tr. 177). The books of the businesses are not separately kept (Tr. 178).

Diversification

54. Neither the applicant nor its principals have any ownership or other interest in any other medium of mass communications (Brooker Exh. 1).

Auxiliary Power

55. Brooker will install auxiliary power generation equipment so as to enable its proposed station to remain on the air in the event of a commercial power outage (Brooker Exh. 1).

Integration

56. Earl Brooker will be the general manager of the Seymour station, devoting at least 40 hours per week to that task. He will be responsible for all aspects of the station's operation, including, but not limited to, setting all station policies, hiring and firing, and supervising all personnel, and assuring compliance with all Federal and local laws and regulations. Upon the grant of the Seymour application, Mr. Brooker will terminate any employment he may have at that time so as to enable him to fulfill his full-time commitment as general manager (Brooker Exh. 3).

57. Mr. Brooker has resided within the 1 mV/m contour of the Seymour station from his birth in 1958 to present, with the exception of the years 1981 to 1985. Upon grant of the Seymour application, he will move to Seymour (Brooker Exh. 3).

58. Mr. Brooker's broadcast experience includes:.

August 1989 - present	Annoucer, commercial production WQMM(AM) Kaukauna, WI/WOZZ(FM) New London
March 1988 - August 1989	Announcer, commercial production WROE(FM), Neenah, WI
February 1983 - August 1989	Announcer, Sports Director, commercial production, part-time personnel scheduling WYNE(AM) Neenah, WI
July 1982 - February 1983	Part-time announcer, commercial production WKAU(AM/FM) Kaukauna, WI
September 1979 - February 1982	Announcer, commercial production WNAM(AM) Neenah, WI
May 1978 - September 1979	Announcer, Music Director WAGO(AM) Oshkosh, WI
August 1977 - May 1978	Part-time announcer WMKC(FM)A Oshkosh, WI

(Brooker Exh. 3).

59. Brooker claims enhancement credit for the following service area civic activities of Earl Brooker:

Spina Bifida Bowl-a-thons: emceed events from 1984 to 1989 for regional organization (Tr. 151). Estimates that one-half of these activities may have occurred within the 1.0 mV/m contour (Tr. 143-44).

Seymour Hamburger Festival: volunteer in 1989 and 1990.

Freedom Republican Party Precinct: committeeman from September 1980 to June 1981 (Tr. 158).

(Brooker Exh. 3, pp. 2-3).

Although numerous additional activities were claimed by Mr. Brooker, they were rejected because they occurred outside of the service area of the proposed station (Tr. 118, 143-58). Other identified activities were not creditable civic activities (Brooker Exh. 3, pp. 2-3; Tr. 158, 182-83).

60. *Carol L. Brooker*, the 49 percent General Partner of the applicant, proposes to be integrated into the management of the proposed station as Business Manager on a full-time basis (at least 40 hours per week) (Tr. 125). In this position, she will supervise and train employees and set policy in areas such as accounting, billing, budgeting and traffic (Tr. 125). In the event of a grant of Brooker's application, Mrs. Brooker will resign from her current full-time employment as a nurse manager at Appleton Medical Center and will become a standby nurse at that facility. She will work at the Medical Center during the evenings and weekends, up to ten hours per week (Brooker Exh. 2, pp. 1-2; Tr. 124-26).

61. Mrs. Brooker presently resides at 518 East Spring Street, Appleton, Wisconsin (Tr. 110). She has been a resident of the 1.0 mV/m contour of the proposed station since 1969 with the exception of 1981 to 1985 when she lived in Neenah and Menasha, Wisconsin (Tr. 116). Mrs. Brooker proposes to move her residence to Seymour in the event of a grant of Brooker's application (Brooker Exh. 2, p. 1).

62. Brooker claims enhancement for the following service area civic activity of Carol Brooker:

Seymour Hamburger Festival: volunteer in 1990 (Brooker Exh. 2, p. 2).

Although numerous additional activities were claimed for Mrs. Brooker, they were rejected because they occurred outside of the service area of the proposed station (Tr. 112, 118, 120, 146, 155, 157-58). Other identified activities were not creditable civic activities (Brooker Exh. 2, p. 2; Tr. 182-83).

CONCLUSIONS OF LAW

Basic Qualifications Issues

Site Availability - Devlin

63. At the time Devlin filed its application it possessed the requisite reasonable assurance that its proposed tower site was available to it. It wasn't until July of 1990 that Peter Devlin learned from the site's owner, Bernice Philipsen, that she sold her land to the Oneida Tribe of Indians of Wisconsin. Subsequently, Mr. Devlin made contact with the Tribe and on August 13, 1990 the Tribe's Land Committee unanimously approved Devlin's proposal to lease sufficient acreage to be used as a tower site. Although the Land Committee's approval is to be ratified by the Business Committee, the record shows that such

ratification is nearly always *pro forma*. And although arrangements are yet to be made for the cost of the lease, the provision of electricity and the building of fencing and an access road, this does not detract from the conclusion that Devlin has reasonable assurance of site availability. (*See National Innovative Programming Network, Inc. of the East Coast*, 2 FCC Rcd 5641 (1987), citing *Puopolo Communications, Inc.*, 60 RR 2d 964 (Rev. Bd. 1986).) Devlin has demonstrated that a meeting of the minds with the Oneida Tribe has been reached regarding the proposed site availability. The site availability issue specified against Devlin *IS RESOLVED* in its favor.

Financial and Misrepresentation Issues - Devlin

64. Devlin's projected expenses must be accorded full credit because there is no evidence whatsoever that his estimates are "so far below average or beyond a range of reasonableness." *Kaye - Smith Enterprises*, 98 FCC 2d 675, 677 (1984). To meet its $400,000 of costs estimate for the construction and operation of the station for three months without revenue, the Devlins are relying on a bank loan commitment in the amount of $400,000 from the Valley Bank in Green Bay, WI.

65. In *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (1990), the Review Board enunciated the test for determining whether an applicant had reasonable assurance of "committed sources of funds" from a bank or other lending institution:

> Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi - State Communications, Inc. v. FCC*, 590 F. 2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms).

66. The Valley Bank loan commitment letter indicated that "the pricing and terms of amortization of any loan commitment will, of course, be contingent upon the exact credit conditions prevailing at the time of such commitment . . . ." The letter was silent as to collateral and guarantees.

67. Devlin admits that the bank letter does not list the collateral requirements, the duration of the loan and the monthly repayment figure, but argues that these conditions were discussed by Devlin and the bank's representative Hietpas and that Devlin was advised that collateral would be required and that the identity of the collateral would be specified when the formal loan request was considered by the loan committee. Relying on *A. P. Walter, Jr.*, 6 FCC Rcd 875 (Rev. Bd. 1991), Devlin maintains that the absence of these conditions in the bank commitment letter are not disqualifying.

68. However, the Review Board Decision in *A. P. Walter, Jr.* does not support Devlins' position. In *A. P. Walter, Jr.*, the applicant, Ladies III Broadcasting, Inc., to meet costs of the $500,000 relied on two bank letters of $250,000 each. Although neither of the bank letters discussed collateral, the Review Board did not deem the omission significant because of the circumstances of the case. It appears that in issuing its $250,000 loan commitment the Barnett Bank reviewed principal Hoy's family's financial statement which indicated a net worth of over $1 million. In issuing its $250,000 loan commitment letter the Third National Bank ("TNB") reviewed principal Phillips' and her husband's joint tax return which stated a gross income of $302,935 and Mr. Phillips' financial statement which indicated a net worth of over $6 million. Further the TNB officer believed that Mr. Phillips' tax free bonds were probably sufficient to meet the collateral requirements. In the instant case the financial statements of the Devlins do not indicate that they have sufficient collateral to guarantee the loan. No source of collateral was considered by the bank. Inasmuch as specific collateral was not considered, it must be deemed that Devlin's Valley Bank letter is fatally deficient and at best an accommodation letter. *See Scioto Broadcaster*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990). Based on the foregoing, it is ruled that Devlin did not have the reasonable assurance of adequate financing at the time it submitted its application and is presently financially unqualified.

69. Although Devlin's Valley Bank loan commitment letter is deemed a mere accommodation, the record does not indicate that the Devlins intended to misrepresent their financial capabilities. The record indicates that Peter Devlin has at all times believed that the Valley Bank commitment letter complied with Commission requirements. The misrepresentation issue *IS RESOLVED* in Devlin's favor.

Standard Comparative Issue

70. The Devlins receive 100 percent quantitative integration credit for their proposal to integrate Peter and Patricia Devlin into the management of the proposed station. This credit is enhanced by Mr. Devlin's extensive broadcast experience, Mrs. Devlin's female status, the Devlins' long-term, continuous service area residence (slightly enhanced by their proposal to move to Seymour upon grant of their application), and the Devlins' extensive civic service area civic activities (including Mr. Devlin's Seymour civic activities).

71. Brooker is entitled to 51 percent quantitative integration credit for the proposed integration of Earl Brooker. Although Brooker claims credit for 100 percent quantitative integration, its proposal to integrate 49 percent general partner Carol Brooker is not creditable. It is clear that Mrs. Brooker was only added to the application on the "B" cut-off date of the proceeding in an effort to make Brooker's application more competitive with the opposing applicants who each had proposed some degree of female ownership. Mrs. Brooker testified that she had no role in the preparation of the application. Additionally, she did not participate in Brooker's efforts to obtain financial qualifications -- a process which was not undertaken until the same period of time, early June 1988, when Mrs. Brooker was being added to the application. Furthermore, when Mrs. Brooker agreed to be a general partner in June 1988, she had no intention of working at the proposed station or of terminating her current em-

ployment as a nurse manager. It was not until March 1990, when Brooker's integration statement was due to be filed, that Mrs. Brooker was given a proposed role at the station. As of this date, Mrs. Brooker has not pledged to entirely forsake her nursing career if Brooker's application is granted. Mrs. Brooker has arranged that she will continue to work as a nurse for her current employer on weekends and evenings should the application be granted. Additionally, the record indicates that Mr. Brooker treats the general partnership as an extension of his sole proprietorship business of DJ service. The funds of the two business are co-mingled and the books are not separately kept.

72. The totality of the record evidence indicates that Carol Brooker's last minute addition to the Brooker application as an integrated general partner was made to garner additional comparative credit. This combined with her utter lack of active participation in the applicant's affairs undermines the reliability of the proposal to be meaningfully integrated into the management of the proposed station. *See Cuban - American Limited*, 5 FCC Rcd 3781, 3786 (1990); *Bradley, Hand and Triplett*, 89 FCC 2d 657 (Rev. Bd. 1982). Accordingly, integration credit will be denied to Carol Brooker.

73. Earl Brooker's 51 percent quantitative integration credit is substantially enhanced by Mr. Brooker's six year service area residence and slightly enhanced by his promise to move to Seymour upon grant of license. Earl Brooker's integration also is slightly enhanced by his civic involvement and broadcast experience.

74. Were Carol Brooker's integration proposal to be credited, it would be substantially enhanced by her six year service area residence and slightly enhanced by her promise to move to Seymour upon grant of license and slightly enhanced by her civic involvement in the proposed service area. Her proposed integration would also receive credit for her female status.

75. *Diversification:* Neither the Brookers nor Devlins have any interest in any media of mass communications. They are equal on the diversification criterion.

76. *Auxiliary Power:* Both applicants propose auxiliary power; they are equal in this area.

77. *Comparative Coverage:* The parties stipulated that there is no decisional difference in the coverage proposals of the two applicants.

ULTIMATE CONCLUSIONS

78. It has been found that the Devlins lack the requisite reasonable assurance of the availability of adequate funds for the construction and operation of their proposed station. Consequently, their application must be denied. The winner is the remaining applicant, Brooker Broadcasting.

Accordingly, *IT IS ORDERED* that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Earl J. Brooker and Carol L. Brooker d/b/a Brooker Broadcasting (File No. BPH-880217ML) for a Construction Permit for a new FM station on Channel 282 in Seymour, Wisconsin *IS GRANTED*, and the application of Peter Joseph Devlin and Patricia Eve Devlin (File No. BPH-880216MS) *IS DENIED* [1]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-332

In the Matter of

Amendment of Section 73.202(b), RM-5751
Table of Allotments,
FM Broadcast Stations.
(Oildale, California)

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 1991; Released: October 15, 1991

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission is a Petition for Reconsideration of the *Report and Order*, 3 FCC Rcd 5223 (1988) ("*Oildale Report*"), in this proceeding filed by Double D Broadcasting Company ("Double D"), licensee of Station KRAB-FM, Channel 291A, Green Acres, California. The *Oildale Report* substituted Channel 237B1 for Channel 237A at Oildale, California, and modified the license of Buckley Broadcasting Company ("Buckley") for Station KLLY(FM), Channel 237A, Oildale, to specify operation on the upgraded channel. Buckley filed an Opposition to Petition for Reconsideration; Double D filed a Reply; and Buckley filed a Motion for Leave to File Response and a Response.[1]

BACKGROUND

2. At the request of Buckley, the Commission issued a *Notice of Proposed Rule Making*, 2 FCC Rcd 5328 (1987), proposing that Station KLLY be upgraded from Channel 237A to Channel 237B1 at Oildale to provide that community with its first wide coverage area FM service. Thereafter, Double D filed a timely counterproposal requesting the substitution of Channel 291B1 for Channel 291A at Green Acres and the modification of its license for Station KRAB-FM to operate on the upgraded channel. By a Commission staff letter dated August 5, 1988, Double D's counterproposal was dismissed as technically deficient because the transmitter site proposed by Double D for Channel 291B1 was one from which Double D could not provide the required city grade signal over the entire community of Green Acres. On the contrary, the letter found that from Double D's proposed transmitter site, a city grade signal could be provided to only 79% of Green Acres.[2] Thereafter, we separately issued a *Report and Order* which substituted Channel 237B1 for Channel 237A at Oildale and modified Buckley's license to specify operation on the upgraded channel.

THE PLEADINGS

3. In its petition, Double D contends that the Commission's action dismissing its counterproposal for failure to comply with the city grade coverage requirements of Section 73.315(a) of the Rules was premature. Rather, Double D believes that the Commission should have withheld action on its counterproposal until its petition for reconsideration in another proceeding, MM Docket 86-289, was resolved because this would enable it to cure the city grade coverage deficiency inherent in its counterproposal.[3]

4. In its opposition, Buckley contends that the petition is procedurally defective on two grounds. Buckley argues that Double D lacks standing under Section 405 of the Act[4] to file a petition for reconsideration of the *Oildale Report* because Double D was not aggrieved or adversely affected by that document but rather by the letter of August 5, 1988, which dismissed its counterproposal. Second, even if Double D's petition is viewed as a petition for reconsideration of the letter of August 5, 1988, it is late filed because Section 405 requires that petitions for reconsideration be filed within thirty days. Buckley also contends, citing *Walter Lane Haber*, 45 RR 2d 1312 (B. Bur. 1979), that the Commission lacks authority to waive the statutory filing period.

5. Buckley further argues that Double D's petition is substantively flawed. First, Buckley claims that there is no linkage between this proceeding and MM Docket 86-289 because its proposed upgrade at Oildale met the minimum distance separation requirements to the two mutually exclusive proposals at Santa Margarita and Guadalupe, California. Second, Buckley alleges that the Commission was correct in dismissing Double D's counterproposal as technically defective because it did not comply with the Commission's city grade coverage requirements.

6. In its reply, Double D challenges Buckley's argument that Double D should have filed its petition for reconsideration within 30 days of the August 5, 1988, dismissal letter. Double D contends that since the letter it received from the Commission was undated, the procedural dates for appealing from the letter were never established.[5] As a result, Double D believes that it was obligated to file its

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[1] While our rules do not contemplate the filing of such a pleading, we will grant Buckley's motion because consideration of Buckley's response will enable the Commission to develop a more complete record and will not further delay resolution of this proceeding.

[2] A second counterproposal was submitted by Five Cities Broadcasting, Inc, licensee of Station KPGA(FM), Pismo Beach, California. It was returned by a separate letter on technical grounds.

[3] Specifically, in its petition for reconsideration in MM Docket No. 86-289, Double D requested a further site restriction on the allotment of Channel 291B1 at Santa Margarita, California. Double D contends that this in turn would give it more latitude in selecting a new site for its proposed upgrade at Green Acres from it could provide city grade coverage to all of Green Acres.

[4] Section 405 of the Act states that "[A]ny party ... or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration.... A petition for reconsideration must be filed within 30 days from the date upon which public notice is given of the order, decision, report, or action complained of."

[5] In support of this position, Double D submits a copy of the letter sent by the Commission to Double D's counsel, which has no date on it.

Petition for Reconsideration in this matter in response to the *Oildale Report* which acknowledged the earlier dismissal of Double D's counterproposal.

7. In its response, Buckley argues that, regardless of whether the copy of the letter Double D received was undated, Commission records reveal that the letter was dated August 5, 1988. In support of this position, Buckley submits a copy of the staff letter in question which was obtained from the Commission's files. The letter contains the impression of a rubber stamp indicating that it was signed and mailed on August 5, 1988. Buckley believes that, under these circumstances, there is no justification for ignoring the mailing date as the trigger for the statutory filing period. Buckley believes that this result is also warranted because Double D has not argued lack of actual notice of the letter or that the postal service delayed in delivering the letter.

DISCUSSION

8. After careful consideration of the record in this proceeding, we will deny Double D's petition because it was late filed in violation of Section 405 of the Communications Act. In essence, this section requires that petitions for reconsideration be filed within 30 days of the date on which public notice is given of the action as defined by the Commission's Rules. Section 1.4 of the Commission's Rules provides that if the action in question is neither published in the Federal Register nor released, and if a descriptive document entitled "Public Notice" is not given, then public notice occurs on the day after the date on the document sent to persons affected by that action.[6] The rule further states that the first day for computing the 30-day filing period is the day after the day on which public notice occurs.

9. Applying these provisions to the present case, we find that the action document was the staff letter of August 5, 1988, because this was the document that dismissed Double D's counterproposal for failure to comply with the city grade coverage rule. Since this letter was neither published in the Federal Register nor the subject of a descriptive document entitled "Public Notice," public notice occurred on the day after the date appearing on the letter. Commission records confirm that this letter dismissing Double D's counterproposal was dated and mailed to Double D's counsel on August 5, 1988. As a result, public notice occurred on August 6, 1988; and the 30-day period for filing petitions for reconsideration began on August 7, 1988, and ended on September 6, 1988. Since Double D's petition for reconsideration was filed on October 17, 1988, it was late filed in violation of the statute.

10. We also do not have the authority to waive the statutory filing period for petitions for reconsideration except in limited situations where there has not been notice to the parties, as required by the Commission's Rules.[7] In this instance, no showing has been made that Double D did not have notice of the staff letter or that the postal service delayed in delivering the letter. Therefore, there is no basis for waiving the statutory filing period. Indeed, if Double D's counsel had doubts about the date of the letter and its impact on the computation of the filing deadline, it could have contacted the Commission's staff for clarification.[8]

11. Accordingly, IT IS ORDERED, That the Motion for Leave to File Response filed by Buckley Broadcasting Company IS GRANTED.

12. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Double D Broadcasting Company IS DISMISSED.

13. For further information about this proceeding, contact Belford V. Lawson, III, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

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[6] Section 1.4 was recently amended to redefine public notice as the day that Commission action is taken (*i.e.*, the day that a rulemaking decision is printed in the Federal Register or the date of a letter sent to parties that was neither printed in the Federal Register nor the subject of a descriptive document entitled "Public Notice"). However, this amendment is not applicable in this proceeding because it does not become effective until October 15, 1991.

[7] *See, e.g., Richardson Independent School District*, 5 FCC Rcd 3135 (1990); *Mary R. Kupris*, 5 FCC Rcd 5142 (1990); and *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976).

[8] Even if Double D's petition were considered on the merits, it would still be denied. First, the Commission's staff properly dismissed Double D's counterproposal for failure to comply with the city grade coverage rule, and no showing has been made by Double D to refute this finding. Second, there is no basis for deferring the Oildale upgrade pending resolution of MM Docket No. 86-289 because there is no linkage between these proceedings. Buckley's upgrade at Oildale met the minimum distance separation requirements to the allotments at issue in MM Docket No. 86-289, and, under these circumstances, Double D cannot cure a technical deficiency in its counterproposal in the Oildale proceeding by suggesting a resolution in MM Docket No. 86-289.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-465

In the Matter of

Resolution of Interference
Between UHF Channels 14 and 69
and Adjacent-channel Land
Mobile Operations

ERRATUM

Adopted: October 3, 1991; Released: October 15, 1991

By the Chief, Mass Media Bureau:

1. This action extends the effective date for rules adopted in the *Report and Order* in MM Docket No. 87-465 (*Report*), 6 FCC Rcd 5148, from October 15, 1991, to October 17, 1991. The *Report*, which was released on August 29, 1991, codified the interference resolution requirements for broadcast stations operating on UHF channels 14 or 69. The effective date is extended to allow the appropriate time (determined in accordance with 47 CFR § 1.427) between the date the rules were published in the Federal Register, September 16, 1991, and their effective date.

2. Accordingly, IT IS ORDERED THAT the effective date of the amendment to 47 CFR § 73.687 adopted in the *Report* IS EXTENDED to October 17, 1991.

3. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.24(b) and 0.283 of the Commission's Rules (47 CFR Sections 0.24(b) and 0.283).

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 16, 1991

COMMISSION REMINDS BROADCAST LICENSEES AND CABLE OPERATORS OF SPONSORSHIP IDENTIFICATION REQUIREMENTS APPLICABLE TO PAID-FOR "PUBLIC SERVICE" MESSAGES

The Commission has received complaints that a number of broadcast stations and some cable operators have broadcast and cablecast "public service" messages paid for by governmental, non-profit, or other entities without announcing at the time of the airing that the station or cable operator received payment for making the announcements.

Section 317 of the Communications Act of 1934, as amended, provides in pertinent part:

> (a)(1) All matter broadcast by any radio station for which any money, service, or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person....

Based on this statutory requirement, related Commission rules require broadcasters (47 C.F.R. § 73.1212) and cable operators (47 C.F.R. § 76.221) to inform the audience of two things: that it is hearing or viewing matter which has been paid for, and the identity of the message sponsor. Accordingly, the Commission has explained that a sponsorship identification announcement must "state in language understandable to a majority of the audience *that the station has received consideration for the matter broadcast* and from whom that consideration was received." *Public Notice*, 66 FCC 2d 302, 303 [41 RR 2d 761, 762] (1977) (emphasis added).

In some cases brought to our attention recently, broadcasters and cable operators seemed to believe that public service messages complied with Section 317 and related rules because they clearly identified the source of the message, usually a nonprofit or governmental entity. However obvious the "source" may be, this information alone does not adequately convey to the public that the entity has paid the station or cable operator for such broadcast or cablecast. The provisions of Sections 73.1212(f) and 76.221(e) of the Commission's Rules, allowing the mere mention of the sponsor's name or product to suffice as a sponsor identification, do not apply unless "commercial products or services" are being advertised. National Alcohol Awareness Week, city recycling efforts, and the like, are not "commercial products or services" within the purview of those subsections.

Generally, when no payment or other valuable consideration is paid or promised[1] for the broadcast or cablecast, no "sponsorship identification" is necessary, since by definition there is no sponsor. A "public service announcement" (one for which no charge is made and which is regarded as serving community interests, as by promoting programs, activities, or services of governmental or other nonprofit organizations) exemplifies the type of material that would not require sponsor identification because it is broadcast or cablecast for free. When payment[2] *is* made, however, the same announcement, by failing to include the fact that the party paid for the announcement, violates Section 317 of the Communications Act and related Commission Rules. *Cf. United States Postal Service*, 41 RR 2d 877 (1977), and *Department of Defense*, 41 RR 2d 881 (1977). Internal record-keeping practices, such as logging the spots as paid-for commercials, do not serve the purpose of advising the general public at the time of broadcast or cablecast that payment or other consideration has been received, and consequently do not fulfill the sponsorship identification requirements.

For further information, contact Marcia Diamond, (202) 632-3922.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTES

[1] Pursuant to Section 507 (47 U.S.C. § 508), whenever valuable consideration for the inclusion of material in a broadcast is given to or received by an entity other than the station (*e.g.*, consideration is paid by a commercial entity to its public relations firm for production of an announcement, or money is given to a station employee to include a particular product in a broadcast), disclosure of that fact must be made to the station. In these cases, the broadcaster (or cablecaster), even though it did not receive the payment itself, must announce that consideration has been given and by whom. *See* 47 U.S.C. § 317(b). Broadcasters and cablecasters are also reminded of their obligations, under Section 317(c) and related rules, to exercise reasonable diligence to learn of such payments.

[2] "Payment" as used in this notice is, of course, intended to include a third party's furnishing, without charge or at nominal charge, property or service in exchange for an identification (of a person, product, service, trademark, or brand name) beyond that reasonably related to its use on the broadcast or cablecast. For examples of what constitutes "payment" requiring sponsorship identification, *see Applicability of Sponsorship Identification Rules*, 40 Fed. Reg. 41,936 (1975).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. CSS-87-004-LA

Application for authority to participate in the launch of the INTELSAT VI (F-1)

ORDER AND AUTHORIZATION

Adopted: October 8, 1991; Released: October 16, 1991

By the Chief, International Facilities Division:

1. The Commission has under consideration application, File Number CSS-87-004-LA, filed by the Communications Satellite Corporation (Comsat) on March 31, 1987, and updated on September 25, 1991, for authority to participate in the launch, positioning and in-orbit testing of the modified INTELSAT VI (F-1) satellite.

2. The application was placed on the Commission's Public Notice on April 8, 1987. No comments were received.

3. The INTELSAT VI (F-1) was delivered from the manufacturer's facility by land transport and arrived at the launch site in French Guiana, and is scheduled to be launched on October 29, 1991, utilizing an Ariane 44L commercial launch vehicle. This satellite will replace the INTELSAT VI (F-4) at 332.5^0 East Longitude. The INTELSAT VI (F-4) will replace the INTELSAT V-A (F-11) at 63^0 East Longitude in the Indian Ocean Region Major Path role. It is anticipated that the INTELSAT VI (F-1) will be in service by mid December 1991.

4. The estimated costs associated with the INTELSAT VI (F-1) are as follows (all amounts in real year dollars):

HAC Contract (including delivery price, engineering changes and amendments	$134,167,000
HAC Launch Support	$ 1,700,000
HAC Performance incentives, capitalized	$ 11,560,000
HAC Performance incentives, expensed	$ 15,488,000
Arian Launch Vehicle and services	$111,723,000
TOTAL INTELSAT	$274,638,000
TOTAL COMSAT (based on current ownership share of 22.876%	$ 62,826,189

5. In view of the foregoing and the need to provide the necessary satellite facilities to meet traffic requirements, we conclude that the public interest would be served by a grant of the subject request. Accordingly, Comsat is AUTHORIZED to participate in the launch and test program of the INTELSAT VI (F-1) satellite to be positioned at 332.5 degrees East Longitude, subject to the following terms and conditions:

(a) This authorization is limited to the described program. Any change in the authorized location due to a launch delay or other circumstances will be considered upon a proper request by Comsat for authority;

(b) Comsat shall furnish via the INTELSAT VI (F-1) only those channels of communication for commercial service which have been, or may be, authorized by the Commission under Section 214 of the Communications Act of 1934, as amended;

(c) Within 30 days after completion of the testing program, Comsat shall provide the Commission with a summary report of its results and upon request, shall make the detailed test data available;

(d) Conduct of the program authorized here shall be without interruption of commercial satellite service now authorized at U.S. earth stations;

(e) Neither this authorization nor any right granted herein shall be assigned or otherwise transferred without approval of the Commission; and

(f) Unless extended or modified for good cause, this authorization shall terminate six months after the release date of this order.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Deferral of Rate of Return Represcription Filings Pursuant to Section 65.102(c) of the Rules — AAD 91-57

MEMORANDUM OPINION AND ORDER

Adopted: October 4, 1991; Released: October 16, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Sections 65.102(c) and 65.200 of the Commission's Rules[1] require certain exchange carrier holding companies to file initial rate of return submissions with the Commission during January of each even numbered year beginning in 1986. This Order defers the filing date for the 1992 initial submissions from January 3, 1992, to August 3, 1992.

II. BACKGROUND

2. Part 65 of the Commission's Rules establishes procedures and methodologies for rate of return prescription proceedings. These rules contemplate beginning a new represcription proceeding every two years. To facilitate the development of a full and fair record in these proceedings, the rules require exchange carrier holding companies meeting specified criteria to submit information regarding their cost of capital for interstate access service during January of each even numbered year beginning in 1986.[2] The rules also provide a schedule for responsive submissions, limited discovery, cross examination where appropriate, proposed findings and conclusions, and possible oral argument. This schedule begins 35 days and ends about 100 days after the holding companies' initial submissions.[3]

3. The requirements for the holding companies' initial submissions are extensive, occupying over four pages in the Code of Federal Regulations.[4] In CC Docket No. 87-463,[5] the Commission sought comment on a number of proposed changes to these requirements as part of an effort to refine its rate of return procedures and methodologies. The Commission has not yet issued a Report and Order in that Docket.

III. DISCUSSION

4. In the *1990 Represcription Order*, the Commission stated that it would resume the task of attempting to refine, and possibly streamline, its rate of return procedures during the period prior to the scheduled beginning of the next represcription proceeding in January 1992.[6] We believe that the Commission will not complete this task in sufficient time for the holding companies to file initial rate of return submissions on schedule. Accordingly, we find that a deferral of the filing date for those submissions is warranted.

5. We also believe that two considerations should guide us in determining the length of the deferral. First, the record in CC Docket No. 87-463 was compiled four years ago, prior to significant changes in the local exchange carrier industry and in our regulation of that industry. The magnitude of these changes suggests the need for further notice and comment before the "adoption of revised rate of return procedures. Because of this need, we believe that we should select the latest possible filing date for initial rate of return submissions that is consistent with the Commission's overall regulatory timetable. Second, we believe that, absent extraordinary changes in economic conditions, the earliest possible need for a represcription will occur in connection with the April 1993 annual access tariff filings. The 1990 represcription proceeding resulted in the adoption of a represcription order on September 19, 1990, seven months after the holding companies' initial submissions on February 16, 1990.[7] In view of this performance, we believe that a filing date of August 3, 1992 for the holding companies' initial submissions will enable the Commission to complete a represcription proceeding in sufficient time for its results to be incorporated into the April 1993 access tariff filings, and that a deferral until that date will serve the public interest.

IV. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 C.F.R. §§154(i), 154(j), and Sections 0.91(a) and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91(a) and 0.291, that the filing date for initial submissions in accordance with Section 65.102(c) of the Commission's Rules, 47 C.F.R. §65.102(c), IS DEFERRED until August 3, 1992.

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[1] 47 C.F.R. §§65.102(c), 65.200.

[2] Presently, only the Regional Bell Operating Companies meet the criteria.

[3] 47 C.F.R. §§65.102-65.106.

[4] *See* 47 C.F.R. §§65.201-65.400.

[5] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Local Exchange Carriers, *Notice of Proposed Rulemaking*, CC Docket No. 87-463, 2 FCC Rcd 6491 (1987).

[6] Represcribing the Authorized Rate of Return for Interstate Access Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532, para. 220 (1990) (*1990 Represcription Order*), *petitions for recon. pending, petitions for review docketed sub nom.* Illinois Bell Telephone Co., *et al.* v. FCC, No. 91-1020 (D.C. Cir. filed Jan. 11, 1991).

[7] *See id.* at 7507. Unusual difficulties with an electronic document release system delayed the release of that order until December 7, 1990. We anticipate no similar delays in the future.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 16, 1991

CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

PUBLIC COMMENT INVITED

American Telephone and Telegraph Company and several local exchange carriers filed proposed revisions to their cost allocation manuals for the separation of regulated and nonregulated costs for the quarter ended September 30, 1991. Listed below are the names of the carriers that filed revisions and the file number assigned to each revision.

Ameritech Operating Companies	AAD 91-58
American Telephone and Telegraph Company	AAD 91-59
Bell Atlantic	AAD 91-60
BellSouth Corporation	AAD 91-61
Cincinnati Bell Telephone Company	AAD 91-62
NYNEX Telephone Companies	AAD 91-63
Nevada Bell	AAD 91-64
Pacific Bell	AAD 91-65
Puerto Rico Telephone Company	AAD 91-66
Rochester Telephone	AAD 91-67
Southwestern Bell	AAD 91-68
United Telephone	AAD 91-69
U S West, Inc.	AAD 91-70

Parties may file comments on the proposed revisions to the cost allocation manuals no later than **November 12, 1991.** Replies should be filed by **November 27, 1991.** Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Ed Dashkin, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the Downtown Copy Center (DCC), 1114 21st St., N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Ed Dashkin, (202) 634-1861.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-18

In the Matter of

Amendment of Section 73.202(b),	RM-6510
Table of Allotments,	RM-6586
FM Broadcast Stations.	RM-6725
(Clinton, Saint Pauls and Southern Pines, North Carolina, and Chesterfield, South Carolina)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1991; Released: October 15, 1991

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for reconsideration filed by Willis Broadcasting Corporation and its subsidiary, WMXS, Inc. ("petitioner"), successor-in-interest to Sampson Broadcasting Co., Inc. ("Sampson"), of the *Report and Order*, 6 FCC Rcd 4370 (1991), in this proceeding. [1] The *Report and Order, inter alia*, denied Sampson's petition for rule making requesting the substitution of Channel 295C2 for Channel 296A at Clinton, North Carolina, and the modification of Station WMXS(FM)'s (formerly WCLN-FM) license to specify operation on the higher powered channel. Muirfield Broadcasting, Inc., licensee of Station WIOZ(FM), Southern Pines, North Carolina, and Lumbee Regional Development Association, Inc., filed comments in opposition to the petition for reconsideration. [2]

2. Section 1.429 of the Commission's Rules and Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405, state that petitions for reconsideration must be filed within 30 days of public notice of a Commission decision. The *Report and Order* in this proceeding was published in the Federal Register on July 22, 1991, but petitioner failed to file its reconsideration request until August 29, 1991. Petitioner acknowledges that its petition is late-filed but states that it should be accepted because petitioner was not timely served with a copy of the decision and was delayed in obtaining a copy. In support, petitioner alleges that it was informally advised by the staff of the Allocations Branch that the *Report and Order* had been adopted, was soon to be released and, erroneously, that Sampson's proposal had received favorable action.

3. Except where the Commission fails to provide notice of its decisions to parties, as required by our Rules, we lack the authority to extend or waive the 30-day period specified in the Communications Act. *See, e.g., Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); *Mary R. Kupris*, 5 FCC Rcd 5142 (1990). The Commission properly served a copy of the *Report and Order* on Sampson, the petitioning party, and not on the petitioner herein, as the petitioner did not participate in the rule making. Petitioner also failed to provide any reason why it could not have obtained a copy of the decision in a timely fashion, even though petitioner admits that it knew the *Report and Order* had been adopted. Petitioner's claim that it was misinformed by a Commission staff member does not excuse its failure to timely obtain the document. In fact, petitioner acknowledges that "Commission policy precludes reliance on informal staff advice." Therefore, we lack the authority to waive the 30-day period for filing petitions for reconsideration and decline to do so. As a result, we need not examine the substance and merits of petitioner's reconsideration.

4. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Willis Broadcasting Corporation and its subsidiary, WMXS, Inc., IS DISMISSED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

[1] The Commission granted the application for assignment of license to petitioner on June 4, 1991. *See* BALH-910424EJ and BALH-910520ED.

[2] In light of the action taken herein, these comments need not be addressed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-472

In the Matter of

Amendment of Section 73.202(b),	RM-7342
Table of Allotments,	RM-7570
FM Broadcast Stations.	
(Rock Valley and Sibley, Iowa,	
Pipestone, Minnesota, Blair and	
Nebraska City, Nebraska, and Sioux	
Falls and Vermillion, South Dakota)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 3, 1991; Released: October 16, 1991

By the Assistant Chief, Allocations Branch:

1. At the joint request of Wallace Christensen, licensee of Station KISD, Pipestone, Minnesota, and Christensen Broadcast Group, Inc., licensee of Station KVHT, Vermillion, South Dakota ("Christensen/CBG"), the Commission has before it the *Notice of Proposed Rule Making and Orders to Show Cause*, 5 FCC Rcd 6444 (1990), proposing the substitution of Channel 254C for Channel 254C1 at Pipestone, the modification of Station KISD's license to specify the higher powered channel, the substitution of Channel 292C1 for Channel 292A at Vermillion and the modification of Station KVHT's license accordingly.[2] To accommodate the allotment of Channel 254C at Pipestone, the *Notice* also proposed the substitution of Channel 233A for Channel 252A at Sioux Falls, South Dakota, and the modification of the license of Sioux Falls College for Station KCFS.[3] To accommodate the allotment of Channel 292C1 at Vermillion, the *Notice* further proposed the substitution of Channel 248A for Channel 292A at Blair, Nebraska, licensed to Station KBWH, the substitution of Channel 261A for Channel 295A at Rock Valley, Iowa, for which there are applications pending, and the substitution of Channel 282A for Channel 262A at Sibley, Iowa, which is unoccupied and unapplied for. These requests are interrelated because the substitution of Channel 261A at Rock Valley and Channel 254C at Pipestone both require a channel substitution at Sioux Falls. Christensen/CBG filed comments restating their intention to apply for the Pipestone and Vermillion channels, if allotted, and to reimburse Station KCFS for the costs associated with its change in channel. Comments in opposition to the *Order to Show Cause* were filed by Sioux Falls College ("College"), licensee of Station KCFS, Sioux Falls, South Dakota. Additionally, comments and counterproposal were filed by Sunrise Broadcasting Corporation ("Sunrise"), licensee of Station KNCY-FM, requesting the substitution of Channel 249C1 for Channel 249C2 at Nebraska City, Nebraska, and the modification of Station KNCY-FM's license accordingly.[4] Reply comments were filed by Christensen/CBG, Sunrise, Vantage Communications, Inc. ("Vantage"), permittee of Station KKVU, Channel 290A, Omaha, Nebraska, and College.[5]

2. Sunrise requests that its Nebraska City Station KNCY-FM be upgraded from Channel 249C2 to Channel 249C1. The Nebraska City upgrade conflicts with the proposed substitution of Channel 248A for Channel 292A at Blair, Nebraska, which was proposed to accommodate the Vermillion upgrade. Sunrise states that there is not a large difference in the respective populations of Vermillion and Nebraska City (9,270 vs. 6,740, respectively), but that there is a great disparity in the local aural service available to each community.[6] According to Sunrise, there are two AM and three FM stations licensed to Vermillion, but there is only one daytime-only AM station and one FM station licensed to Nebraska City. Sunrise argues that Commission policy favors a general proportionality between a community's population and the services licensed to it, citing *Baker v. FCC*, 834 F. 2d 181, 183 n. 4 (D.C. Cir. 1987). Even more compelling, according to Sunrise, is the fact that the Nebraska City upgrade proposal will result in a gain area for Station KNCY-FM, which encompasses 852,743 persons, compared to only 300,203 persons from an upgraded Station KVHT at Vermillion. However, it suggests that the conflict can be resolved and both stations can improve their service if Station KVHT is upgraded from its present Channel 292A to either Channel 292C2 or Channel 292C3. Sunrise states that the allotment of Channel 292C2 or C3 to Vermillion would require the substitution of channels at Sioux Falls, but would not require additional channel substitutions at Blair, Nebraska, or Rock Valley and Sibley, Iowa.

3. In response to the *Order to Show Cause*, College submitted comments opposing the modification of Station

[1] The community of Nebraska City, Nebraska, has been added to the caption.

[2] CBG is the successor in interest to Vermillion Radio, Inc., then licensee of Station KVHT (formerly KVRF).

[3] Station KCFS presently operates on Channel 261A at Sioux Falls. By *Report and Order* in MM Docket 89-53, 5 FCC Rcd 1000 (1990), Station KCFS's license was modified to specify Channel 252A to enable Big Sioux Broadcasting, Inc., to modify the operation of Station KIKN, Salem, South Dakota, to Channel 263C1. The petition for reconsideration of that action, filed by Sioux Falls College, was denied by *Memorandum Opinion and Order*, adopted September 30, 1991.

[4] Public Notice of the filing of the counterproposal was given on December 12, 1990, Report No. 1832.

[5] The following pleadings were filed after the record closed: Statement for the Record filed by Big Sioux Broadcasting, Inc.; Supplement to Sunrise Broadcasting Corp.'s Reply Comments and Motion to Strike Vantage Communications, Inc.'s Reply Comments, filed by Sunrise; Motion for Extension of Time to Oppose Supplement and Motion to Strike filed by Vantage; Opposition to Supplement and Motion to Strike filed by Vantage; and Reply to Opposition to Supplement and Motion to Strike filed by Sunrise. The Commission's Rules do not contemplate the filing of pleadings beyond the comment periods and we find that none of the pleadings provide us with information of decisional significance. Therefore, they will not be considered herein.

[6] Population figures are taken from the 1980 U.S. Census.

KCFS's license. [7] College states that Station KCFS was modified from Channel 211A to Channel 261A in August, 1988, has recently been ordered to change again to Channel 252A to accommodate an upgrade of another station pursuant to the *Report and Order* in MM Docket No. 89-53, and now is being requested to change a third time, to Channel 233A, to accommodate the upgrades proposed in this proceeding. It argues that public confusion would result if Station KCFS were required to change to Channel 233A, so soon after commencing operation on Channel 261A, and that this confusion would be compounded if the station were required to change channels twice more in so short a time. The College alleges that noncommercial educational Station KCFS is being treated differently than commercial FM stations by the fact that it is being requested to change channels twice. It argues that parties seeking upgrades are reluctant to propose multiple channel changes for commercial operations because of the vigorous opposition raised by the affected parties but that no such reluctance is displayed when the affected party is a noncommercial educational facility. In reply comments, College again urges the retention of Channel 261A at Sioux Falls.[8]

4. Vantage submitted reply comments supporting the substitution of Channel 248A for Channel 292A at Blair, Nebraska.[9] Vantage has before the Commission a request to substitute Channel 290C2 for Channel 290A at Omaha, Nebraska, and modify its license for Station KKVU to specify operation on the higher powered channel. *See* MM Docket 89-595, 5 FCC Rcd 1 (1990). It states that if Channel 248A is allotted to Blair, Channel 290C2 can be allotted to Omaha with a site restriction far less than the presently required 20 kilometers, possibly even allowing location of the transmitter within the Omaha city limits. It further states that the conflict between the Nebraska City and Vermillion proposals can be resolved by site restricting the Nebraska City allotment 45 kilometers west-southwest of the community, thus permitting the allotment of Channel 292C1 to Vermillion and Channel 249C1 to Nebraska City. Vantage submits that if the Nebraska City allotment is site restricted as proposed, Station KNCY-FM would provide a first aural service to 64 persons in a 71 square kilometer area and a second aural service to 1,458 persons in a 142 square kilometer area.

5. In reply, Christensen/CBG support Sunrise's counterproposal and CBG states its intention to apply for Channel 292C2, rather than Channel 292C1, if allotted to Vermillion. In response to College's opposition to the modification of Station KCFS's license, they point out that the station was modified from Channel 211A to Channel 261A at College's own request. They also note that while Station KCFS has been ordered to change to Channel 252A pursuant to the decision in MM Docket No. 89-53, the decision is under appeal and thus the change has not yet been implemented. Therefore, if Station KCFS is required to change to Channel 233A, and the change is implemented prior to the resolution of MM Docket No. 89-53, this would represent only a first involuntary change in channel. Christensen/CBG points out that the Commission has frequently stated that there is an inherent public interest benefit in upgrading stations to the maximum extent possible because of the additional service provided to an increased number of people, citing *Grundy Center, Iowa*, 3 FCC Rcd 3965 (1988). As to College's argument concerning the value of numerous channel changes to accomplish the proposed upgrades, Christensen/CBG state that only one channel substitution is now required to enable the Vermillion, Pipestone and Nebraska City stations to expand their coverage areas. In addition, they submit that there is no merit to College's contention that Station KCFS is being treated any differently or unfairly because it is a noncommercial educational station. Christensen/CBG point out that the Commission has regularly and consistently ordered commercial stations to change frequency to accommodate upgraded facilities for another station. Finally, they restate their intention to join with Big Sioux Broadcasting, Inc., in compensating Station KCFS for the costs associated with its channel change.

DISCUSSION

6. Based on the record before us, we believe the public interest would be served by granting Sunrise's counterproposal. Adoption of the proposal permits Stations KISD, KVHT and KNCY-FM to expand their respective service areas by providing Pipestone, Minnesota, Vermillion, South Dakota, and Nebraska City, Nebraska, with wide coverage area allotments. In addition, while adoption of the counterproposal does require Station KCFS, Sioux Falls, to change channel, there is no longer any need to change the allotments at Blair, Nebraska, or Rock Valley and Sibley, Iowa.

7. We find that College has not raised a substantial and material question of fact which would require a hearing on the modification of Station KCFS' license to specify operation on Channel 233A. Christensen has stated its intention to reimburse College for the reasonable costs

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[7] We will not discuss that portion of the College's opposition that is devoted to the merits of the Salem, South Dakota, upgrade in MM Docket 89-53, which required Station KCFS to move from Channel 261A to Channel 252A as the petition for reconsideration was denied by *Memorandum Opinion and Order*, adopted September 30, 1991. *See* n. 3, *supra*.

[8] Additionally, it notes that Big Sioux, permittee of Station KIKN at Salem, South Dakota, and proponent of the rule making which resulted in the modification of Station KCFS' license to Channel 252A, has not participated in this proceeding and questions whether Station KIKN's construction permit remains valid in light of its expiration and lack of an extension request. According to Commission records, Station KIKN timely filed a request for an extension of its construction permit on July 22, 1991.

[9] Vantage also submitted a Motion to Conform Reply Comment Dates, noting that the *Notice of Proposed Rule Making* set January 2, 1990, as the date for filing reply comments but that the Public Notice announcing Sunrise's counterproposal set December 28, 1989, as the date for filing responses to the counterproposal. Generally, the date for filing responses to counterproposals expires after the reply comment deadline specified in the Notice of Proposed Rule Making because there is less than the 15 days usually allowed for the filing of reply comments from the time a counterproposal is given Public Notice and the expiration of the reply comment period. In this case, the time for filing reply comments expired after the 15 day period announced in the counterproposal Public Notice. Therefore, since parties were not required to respond to the counterproposal until the close of the reply comment period, there is no need to conform the reply comment dates and Vantage's Motion is dismissed as moot.

associated with the station's channel change. In addition, to avoid the possibility of multiple channel changes within a short period of time, the Commission staff, in the *Memorandum Opinion and Order* in MM Docket No. 89-53, modified Station KCFS's license to specify operation on Channel 233A in lieu of Channel 252A. Thus, College need only change from Channel 261A to Channel 233A to accommodate both the Station KISD upgrade granted here and the Station KIKN upgrade granted in MM Docket No. 89-53. Our ability to reduce the disruption to Station KCFS' operation is possible because the two proceedings affecting Station KCFS's operating channel were simultaneously pending before the Commission. Even if this was not the case, and Station KCFS was first required to change to Channel 252A and later to Channel 233A, we would find that College has presented no evidence to conclude that it is being treated differently than other FM broadcast stations because it operates as a noncommercial educational facility. Because a change in operating channel may be disruptive to both the station's operation and its listenership, we will order such a change only where we find that the public interest benefits flowing from the change outweigh the benefit which comes from maintaining channel continuity. In this case, modifying Station KCFS' license to Channel 233A enables both Station KIKN at Salem, South Dakota, and Station KISD, Pipestone, Minnesota, to expand their coverage areas. We believe that the modification of Station KCFS's license is consistent with action taken by the Commission on numerous other occasions where it has found that the substitution of an existing station's channel at one community serves the public interest where the substitution permits the provision of a new or expanded service at another community. *See Port Henry, New York, and Middlebury, Vermont*, 6 FCC Rcd 4727 (1991), *Onawa, Iowa, and Vermillion, South Dakota*, 4 FCC Rcd 703 (1989), and *Marietta, Ohio, and Ravenswood, West Virginia*, 2 FCC Rcd 4681 (1987). College has not presented any facts which would lead us to find that the public interest would be better served by Station KCFS's continued operation on Channel 261A. Finally, we need not again modify Station KCFS's license to specify Channel 233A in this proceeding as it was previously so modified pursuant to the *Memorandum Opinion and Order* in MM Docket No. 89-53, However, we do order Christensen to share equally with Big Sioux, permittee of Station KIKN, Salem, South Dakota, the reimbursement costs to which College is entitled because both parties benefit from Station KCFS' channel change.

8. Finally, we do not find that Vantage's proposal merits adoption. Vantage seeks the allotment of Channel 249C1 to Nebraska City, with a site restriction of 45 kilometers, not only to permit the allotment of Channel 292C1 to Vermillion, but also to reduce the 20 kilometer site restriction necessary on Vantage's proposed substitution of Channel 290C2 for Channel 290A at Omaha, Nebraska. The reduction in the Omaha Channel 290C2 site restriction would be possible only if Channel 248A is substituted for Channel 292A at Blair. However, the Blair substitution is no longer necessary in light of Christensen/CBG's concurrence in Sunrise's counterproposal to allot Channel 292C2 in lieu of Channel 292C1 to Vermillion, South Dakota.

9. Channel 249C1 can be allotted to Nebraska City, Nebraska, in compliance with the Commission's minimum distance separation requirements with a site restriction of 43.2 kilometers (26.8 miles) northwest to avoid short-spacings to Station KLAL, Channel 249A, Lamoni, Iowa, and Station KSEZ, Channel 250C1, Sioux City, Iowa. Channel 292C2 can be allotted to Vermillion, South Dakota, with a site restriction of 22 kilometers (13.7 miles) north to avoid shortspacings to Station KBWH, Channel 292A, Blair, Nebraska, and to unoccupied but applied for Channel 295A at Rock Valley, Iowa. Channel 254C can be allotted to Pipestone, Minnesota, and can be used at Station KISD's licensed transmitter site.[10] As proposed, we will also modify the licenses of Station KISD, Pipestone, Minnesota, to specify operation on Channel 254C, Station KVHT, Vermillion, South Dakota, to specify operation on Channel 292C2 and Station KNCY-FM, Nebraska City, Nebraska, to specify operation on Channel 249C1.

10. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 2, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Pipestone, Minnesota	254C
Nebraska City, Nebraska	249C1
Vermillion, South Dakota	292C2

11. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the licenses of Wallace Christensen for Station KISD, Pipestone, Minnesota, Sunrise Broadcasting Corp., for Station KNCY-FM, and Christensen Broadcast Group, Inc., for Station KVHT, Vermillion, South Dakota, ARE MODIFIED to specify operation on Channels 254C,249C1 and 292C2, respectively, in lieu of Channels 254C1, 249C2, and 292A, respectively, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensees shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

[10] The coordinates for Channel 249C1 at Nebraska City are North Latitude 40-53-00 and West Longitude 96-17-30. The coordinates for Channel 292C2 at Vermillion are 42-58-40 and 96-54-54. The coordinates for Channel 254C at Pipestone are 43-53-01 and 95-55-44.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

12. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Wallace Christensen, licensee of Station KISD, Christensen Broadcast Group, licensee of Station KVHT, and Sunrise Broadcasting Corp., licensee of Station KNCY-FM, are required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-595

In the Matter of

Amendment of Section 73.202(b), RM-7539
Table of Allotments,
FM Broadcast Stations.
(North East, Pennsylvania, and
Olean, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 7, 1991; Released: October 16, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Rambaldo Communications, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 5 FCC Rcd 7286 (1990), proposing the substitution of Channel 265B1 for Channel 265A at North East, Pennsylvania, and the modification of Station WRKT-FM's license to specify operation on the higher class channel. To accommodate the allotment at North East, an *Order to Show Cause* was issued to Erin Communications, Inc. ("Erin"), licensee of Station WMXO, Olean, New York, proposing the substitution of Channel 268A for Channel 265A and the modification of Station WMXO's license to specify operation on the alternate Class A frequency. Petitioner filed comments reiterating its intention to apply for Channel 265B1, if allotted to North East. No other comments were received.

2. We believe the public interest would be served by substituting Channel 265B1 for Channel 265A at North East because it could provide the community with a higher powered allotment and enable Station WRKT-FM to expand its coverage area. Erin did not file comments in response to the *Order to Show Cause* and is thus deemed to consent to the modification of Station WMXO's license to specify operation on Channel 268A in lieu of its present Channel 265A. *See* Section 1.87 of the Commission's Rules. In addition, petitioner restated its intention to reimburse Erin for the reasonable costs associated with Station WMXO's channel change. As proposed, we will modify petitioner's license for Station WRKT-FM to specify operation on Channel 265B1 at North East, Pennsylvania, and Erin's license for Station WMXO to specify operation on Channel 268A at Olean, New York.

3. Channel 265B1 can be allotted to North East in compliance with the Commission's minimum distance separation requirements, with respect to domestic allotments, with a site restriction of 2.9 kilometers (1.8 miles) east to avoid a short-spacing to Stations WZPR, Channel 262B, Meadville, Pennsylvania, and WHOT-FM, Channel 266B, Youngstown, Ohio. The site restriction imposed on Channel 265B1 at North East does not obviate the short-spacing to unoccupied and unapplied for Channel 266A at Crystal Beach, Ontario, Canada. However, we confirmed that Station WRKT-FM could limit its power in the direction of Crystal Beach to avoid prohibited overlap of the Crystal Beach 54 dBu protected contour. Channel 268A can be allotted to Olean in compliance with the Commission's minimum distance separation requirements at Station WMXO's licensed transmitter site.[1] Canadian concurrence in the allotment of Channel 265B1, as a specially negotiated allotment, at North East and Channel 268A at Olean, have been received because both communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 2, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Olean, New York	239B, 268A
North East, Pennsylvania	265B1

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Rambaldo Communications, Inc., for Station WRKT-FM, North East, Pennsylvania, IS MODIFIED to specify operation on Channel 265B1, in lieu of Channel 265A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Erin Communications, Inc., for

[1] The coordinates for Channel 265B1 at North East are North Latitude 42-12-30 and West Longitude 79-48-00. The coordinates for Channel 268A at Olean are 42-06-24 and 78-23-28. Because the petition which resulted in these allotments was filed prior to October 2, 1989, Station WMXO can avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station WHUG, Channel 269A, Jamestown, New York.

Station WMXO, Olean, New York, IS MODIFIED to specify operation on Channel 268A in lieu of Channel 265A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WMXO's license, BLH-780918AA, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-780918AA, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

7. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station WMXO, as follows: Erin Communications, Inc., 118 West Henley Street, Olean, New York 14760.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington DC 20554

The General Services Administration
Complainant

v. File No. E-81-36

American Telephone and Telegraph
Company and the Associated Bell
System Companies
Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: October 9, 1991; Released: October 16, 1991

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The General Services Administration (GSA) filed a complaint alleging that the above referenced defendants [1] violated Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), in connection with certain services provided to GSA by defendants under former AT&T Tariff F.C.C. No. 260 (Tariff 260). For the reasons discussed below, we deny the complaint.

II. BACKGROUND

2. This proceeding originally involved a two-count complaint filed by GSA against AT&T and the BOCs challenging the defendants' application of Tariff 260 interstate rates to certain off-premise extension lines (Count I) and short-haul private lines (Count II) leased by GSA and other federal agencies as part of the federal government's private line communications network. GSA requested damages in the form of refunds for the excessive charges allegedly incurred as a result of the defendants' actions between July 12, 1978 and April 27, 1985, the date new access charges went into effect under AT&T Tariff F.C.C. Nos. 9, 10 and 11. In an Order issued in June 1987, we dismissed Count I of GSA's complaint and established a schedule for the presentation of additional evidence regarding GSA's allegations of unreasonable discrimination by the defendants and its claims for damages set forth in Count II. *General Services Administration v. AT&T et al.*, 2 FCC Rcd 3574 (Com. Car. Bur. 1987) (*June 1987 Order*). On September 30, 1987, GSA filed supplemental evidence, consisting of forty-six volumes and a transmittal statement, in purported compliance with our *June 1987 Order*. Volume 1 contains a consolidated list of computer printouts that, according to GSA, summarizes its total overcharge claim. The remaining forty-five volumes purportedly include the specific evidence requested in our *June 1987 Order*, with each volume representing specific states in which a particular defendant's circuits were located. [2] On October 19, 1987, the defendants filed a joint motion to dismiss challenging the adequacy of GSA's evidence. The defendants argued that GSA had again failed to establish a violation of the Communications Act or that it had been damaged by the defendants' actions.

3. On October 21, 1987, we held a conference with all the parties to the proceeding to address concerns raised by the defendants and the Bureau regarding the sufficiency of GSA's evidence and to establish guidelines for the presentation of responsive evidence by the defendants. During that conference, we identified a number of evidentiary points which, in our view, required further development through additional discovery. Because of the volume and nature of GSA's evidence and in the interest of avoiding the expenditure of resources unnecessarily by the parties and the Commission, the parties agreed that additional discovery would be undertaken with respect to a representative sample of GSA's supplemental evidence (Volume 9, AT&T-Illinois) and that the results of that discovery would, to the extent possible, form a basis for our initial assessment of GSA's overall evidence.

4. On November 16, 1987, GSA submitted a list of witnesses it intended to proffer in support of Volume 9 of its supplemental evidentiary filing. Depositions of some of those witnesses were subsequently held on December 17, 1987 and March 2, 1988.[3] In connection with the deposi-

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[1] GSA's complaint, filed December 10, 1981, named AT&T as a defendant but did not specifically name any of the individual Bell Operating Companies (BOCs), referring to them generally as the "Associated Bell System Companies." Subsequently, in its Reply to AT&T's Answer, filed February 26, 1982, GSA stated that the following companies were involved in the alleged unlawful practices:

> Bell Telephone of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, Northwestern Bell Telephone Company, Pacific Northwestern Bell Telephone Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, the Diamond State Telephone Company, The Mountain State Telephone and Telegraph Company, The Ohio Bell Telephone, The Pacific Telephone and Telegraph Company, Wisconsin Telephone Company, Cincinnati Bell Telephone Company.

[2] For example, Volume 2 contains information relating to AT&T circuits leased by GSA in the state of Alabama, while Volume 34 contains information relative to South Central Bell circuits located in the state of Alabama. Each of the volumes (2-46) purportedly contains information regarding all disputed circuit groups within the particular state, the amount of the overcharge based on a comparison of AT&T Tariff 260 rates with the equivalent intrastate rates, interest calculations and information regarding the contiguous nature of the exchanges associated with the disputed circuit groups.

[3] The deponents include three GSA employees, Roger Nevins, Richard Wadding and Patricia Foppe.

tions, we directed GSA on two separate occasions to provide additional supporting documentation relating to the disputed circuit groups contained in Volume 9. Our action was prompted partly by objections made by the defendants regarding the sufficiency of GSA's evidence and our own concerns with the development of GSA's case-in-chief. Following the March 2 depositions, the defendants again complained that GSA had failed to provide the necessary clarification and documentation contemplated by the Bureau. On April 18, 1988, we held a conference with counsel for GSA, AT&T and a representative for the defendant BOCs in order to address the development of GSA's evidence and to structure additional discovery proceedings. At that conference, however, both GSA and the defendants indicated their view that resolution of the proceeding could be expedited and further discovery avoided if the Bureau ruled on what they characterized as the important threshold issues of (1) whether the private line circuits at issue are like services and (2) whether the circuits were between contiguous exchanges. Accordingly, we suspended further discovery in the proceeding and gave the parties the opportunity to submit additional arguments to support their positions on these issues. The parties declined, however, opting instead to rest their cases on the established record.

III. CONTENTIONS OF THE PARTIES

5. Before turning to the parties' substantive claims, it is helpful to describe the nature of the disputed private line services. Private line or leased channel service is a common carrier service using facilities dedicated to a subscriber's use. Functionally, a private line is a transmission channel providing access between or among points specified by a customer on a permanent or virtually permanent basis. It is typically utilized by businesses that engage in high volume communications between major cities or specific locations. Depending upon the terminal equipment involved at the customer's premises, the private line may be used for voice, data, audio or video transmission, and may simply connect two points or permit switching among multiple points. Pursuant to Tariff 260, AT&T offered ten types of Series 2000 voice-grade private line services, Type 2001 through 2010, with each type representing a different classification of private line service. *See AT&T Co.*, 52 FCC 2d 727 (1975); *AT&T Co.'s Private Line Tariff*, 52 FCC 2d 979 (1975), *proceeding terminated*, 58 FCC 2d 1288 (1976). We are concerned here only with two of the private line services, foreign exchange (FX) service (Type 2006) and point-to-point voice-grade service (Type 2001).

6. Series 2000, Type 2006 channels were voice-grade, private line channels provided under AT&T Tariff FCC No. 260 which terminated at one end, called the closed end, at the customer's premises and at the other at a local exchange telephone company switch, called the open end. A Type 2006 channel, together with local exchange service subscribed to at the open end by the same customer, constitutes what is called FX service. This service enables a subscriber in one city or exchange area to place calls to telephones in another city or foreign exchange on a toll free basis, and enables persons in the foreign exchange to place calls to the FX subscriber in a distant city by dialing a local number without paying toll charges or using operator assistance to make a collect call. *See MTS and WATS Market Structure*, CC Docket No. 78-72, 97 FCC 2d 682, 718 (1984). FX gives the customer access to a distant local exchange but does not include the local exchange service as part of the private-line offering. Type 2006 channels, however, were provided to customers only on the condition that the channel terminate at a local exchange. The interexchange private line carrier may procure local exchange service as an agent for the FX customer, but does not offer the use of exchange facilities as part of its FX services. *See MCA Telecommunications Corp.*, 61 FCC 2d 131, 134 (1976). Thus, the FX customer typically receives two separate bills, one for the private-line component of the FX service and the other for the associated local exchange service. [4]

7. Series 2000, Type 2001, as provided for in Tariff 260, comprehended point-to-point voice-grade private-line channels between customer-specified premises. Unlike Type 2006 channels, however, such premises did not include local exchange switch termination points. Type 2001 customers could, nonetheless, obtain access to local exchange service through the use of their own private network switches or PBXs at which most Type 2001 channels terminated. In certain cases, these switching machines or switching devides were customer-owned and operated, and in other cases, such as Centrex and CCSA (Common Control Switching Arrangement), the switches at which Type 2001 channels terminated were telephone company-provided, and frequently were located at the telephone company central office. Type 2001 channels also were used in a strictly point-to-point, non-switched mode for two-point ring-down service, sometimes called hot lines, and in multipoint configurations which variously employed selective signalling features.

8. In April 1977, AT&T filed with the Commission an exception rate for FX lines which provided that all such lines functioning between points in contiguous exchanges within the same state and whose rate centers were 14 miles or less apart would be charged at rates set at the level of applicable state-filed tariffs.[5] All other FX lines

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[4] Prior to the filing of the post-divestiture tariffs, FX customers paid local exchange charges as contained in the respective state tariffs. Afterwards, interstate access charges, specifically, Feature Group A charges, were charged for the equivalent local exchange service.

[5] In its letter of transmittal (No. 12744, April 27, 1977), AT&T stated that the market and cost support studies submitted in support of multistate private line (MPL) rates, in particular Series 2000 interexchange channels, did not directly contemplate the provision of these short channels at interstate rates. AT&T then went on to state that:

> application of the MPL rates... results in substantial rate increases for customers. Since it is not clear at this time whether the current MPL rate levels are appropriately applied to such services, use of the previously applicable intrastate private line rates is desirable until such time as it can be determined that MPL rates, or some other charges, would be proper.

continued to be charged at the generally applicable Tariff 260 interstate rates, the same rate as applied to Type 2001 channels.

9. GSA protests the FX exception rate treatment as an unlawful offering of like communications services at discriminatory rates. GSA maintains that all Series 2000 private lines are like communications services within the meaning of Section 202(a) [6] and, consistent with the Commission's decision in *Department of Defense v. C&P*, 75 FCC 2d 45 (1979), should have been similarly rated under applicable state-filed tariffs.[7]

10. GSA sets forth a number of factors which it believes support a determination that FX and point-to-point services are like. According to GSA:

> Types 2001 (point-to-point) and 2006 (FX) were furnished as sub-classifications within the same series.
>
> Channels for both are engineered to meet the same transmission parameters (i.e., an approximate bandwidth of 300-3000 Hertz).
>
> For both services, signalling may be arranged for either dial pulse or multifrequency pulsing signals.
>
> Past and present pricing practices for the services are identical (mileage charges, for example, are determined from the same price structure).
>
> Local exchange carrier tariffs provide that the two services can be arranged for alternate use.

GSA Opposition to Motion to Dismiss at 17.

11. GSA argues that the Commission in *AT&T-WATS Service*, 70 FCC 2d 513 (1978), pointed to similar factors in finding that MTS and WATS were like services for purposes of the Act.[8] GSA states that the "functional equivalency" test established by the Commission and the courts for determining likeness focuses on whether the services in question are different in any material functional respect.[9] The test, GSA maintains, looks to the nature of the services offered as well as the perspective of the customer faced with differing services. GSA contends that applying this standard, a determination that FX and point-to-point services are like is clearly supported by the function and use of the two services by GSA as well as the defendants' own statements, actions and policies. According to GSA, both services have similar terminations in a Federal Telecommunications Systems (FTS) switch at one end, although FX lines terminate in a local exchange carrier (LEC) central office at the other end, while point-to-point lines either terminate in a LEC central office (Centrex) or a PBX, and are used for the distribution of traffic to the Centrex or PBX. GSA maintains that both are identically engineered to carry FTS voice grade analog traffic and are utilized for the distribution of traffic within an exchange area with the difference being the number of potential subscribers that can be reached. Moreover, GSA states, the traffic engineering and FTS network design considerations that governed whether government calls would be routed to particular locations by FX lines or on direct access line circuit groups were recommended by AT&T.

12. GSA contends that the strongest indication of the fundamental likeness of the services lies in the fact that the mileage rates developed and charged and the local facilities used to provide either FX or point-to-point circuits were and are the same in the applicable tariffs, both before the implementation of exception rate treatment for FX lines and after that exception rate treatment lapsed. GSA contends that if for some period of time certain FX lines were properly priced at an equivalent state rate level as AT&T contends, then AT&T's historical treatment of Series 2000 private line services dictates that concurrent pricing of other Series 2000 lines at an equivalent state rate level was similarly appropriate.

13. In their responsive pleadings, the defendants all assert that GSA has failed to sustain its burden of proof that their actions were unlawfully discriminatory since it has not demonstrated that FX lines and point-to-point lines are like communications services. Defendants argue that GSA's reliance on the discrimination standard set out in *AT&T-WATS Service*, 70 FCC 2d 593 (1970), is self defeating since the Court of Appeals subsequently overturned the Commission's finding in that case that MTS and WATS are like services. *See Ad Hoc Telecommunications Users Committee v. FCC*, 680 F. 2d 790 (D.C. Cir. 1982) (*Ad Hoc*). Defendants state that the court in *Ad Hoc* specifically rejected the notion advanced by GSA that use of the same facilities and technology establishes likeness. On the contrary, defendants argue, the court reaffirmed that the functional equivalency test, with customer perception as a linchpin, is the appropriate standard for determining likeness under the Act. Defendants argue that applying this standard, customers simply do not perceive point-to-point lines and FX lines as like services. This is so, defendants argue, because private-line

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[6] Section 202(a) of the Communications Act provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons or locality, or to subject any particular person, class of persons or locality to any undue or unreasonable prejudice or disadvantage.

[7] GSA states that the Commission specifically found in *DOD v. C&P* that Tariff 260 MPL rates were not devised for short haul services and further directed that C&P continue to offer the private line services at issue under applicable intrastate tariffs until it could be determined that AT&T's MPL rates or some other charges would be proper.

[8] In *AT&T-WATS*, the Commission ruled that MTS and WATS services were like communications services within the meaning of Section 202(a). 70 FCC 2d at 607-611. The Commission recited a number of service features and operational characteristics proffered by the parties as distinguishing MTS from WATS but declared that none of the factors militated against the fact that one service was essentially identical to the other in terms of communications function performed for the subscriber.

[9] GSA cites the Commission's decision in *AT&T-WATS*, *supra*, and the court's decision in American Broadcasting Co. v. FCC, 663 F.2d 133 (D.C. Cir. 1980) and American Trucking Associations, 377 F.2d 121 (D.C. Cir. 1966).

customers who need direct access to the local exchange must subscribe to a service with an open end such as FX. Since point-to-point channels have no open end and thus offer no direct access to the network, the defendants argue that some customers, including GSA, subscribe to both FX and point-to-point private line services at the same location in order to meet different communications requirements. The defendants contend that if GSA perceived the two services as like services capable of being used as alternatives as it claims, then it follows that GSA would have taken the FX service and paid the rates that it now claims were reasonable. Moreover, the defendants argue, GSA is simply wrong that FX and point-to-point are technically similar and priced alike because FX has an open end for which an exchange use charge is applied while point-to-point has no open end and, thus, no charge for use of the local exchange. The defendants point out that the FX tariff requires that the customer subscribe to local exchange service at the open end while there is no similar requirement in the tariff for point-to-point service[10] Finally, defendants argue that FX service has traditionally been tariffed as a distinct classification of private line service at both the federal and state level. [11]

14. The defendants have also called into question the accuracy of GSA's identification of numerous short-haul private lines which GSA argues should have been accorded similar exception rate treatment. The defendants assert that many of the disputed circuits identified by GSA are actually between non-contiguous exchanges and therefore not subject to the exception rate treatment. In our *June 1987 Order*, we specifically requested GSA to submit evidence indicating whether the disputed circuits are between contiguous or non-contiguous exchanges. 2 FCC Rcd at 3577. In response, GSA submitted excerpts from local telephone directories and U.S. Department of Commerce maps of exchange area borders for all telephone companies within a particular state which it claims establishes the contiguous nature of the defendants. GSA argued that the term "contiguous" is largely irrelevant to its complaint since in all cases circuits satisfying the distance requirement of 14 miles or less will be between exchanges that are contiguous since the accepted definition of contiguous allows for contiguous areas to be in close proximity without actually touching.[12]

15. For their part, the defendants argue that GSA has failed to provide any evidence to support its belief that local prefixes in telephone books are probative of whether the circuits are between contiguous exchanges. The defendants insinuate that GSA's definition of contiguous, if applied, would render the contiguous/non-contiguous distinction meaningless in the context of the Tariff 260 rate structure.

IV. DISCUSSION

16. The core issue in this case is whether different charges have been made for like communications services in violation of Section 202(a) of the Communications Act. The determination of likeness, within the meaning of Section 202(a), centers on whether the services in question are functionally equivalent.[13] The test requires the Commission to examine both the nature of the services and the customer's perception of the functional equivalency of those services, with customer perception being the linchpin. The customer perception of likeness concerns customers' use of service and whether customers perceives that the nature of one service is like another. Any difference perceived by the customer cannot be dependent upon cost or rate differences. Although service costs can be used to justify rate differences between like services, they cannot be used in the initial determination of likeness. The bottom line of the like-service determination is whether any material functional differences exist between one service and another. Here, we are using the term functional equivalency to refer to equivalency between and among service attributes as opposed to engineering or technical specifications. This is not to say that engineering and technical factors cannot enter into the like services equation. It is simply that for these factors to be relevant, they must create functionally material differences between services, and we have determined that in this case they do not.

17. As noted, *supra*, Type 2006 channels were defined in AT&T's Tariff 260 as voice-grade, nominal 4 kHz Series 200 channels which, *inter alia*, were required to be terminated at one end, called the open-end, at a telephone company local exchange switching center.[14] Type 2001 channels, on the other hand, could variously have been terminated at any customer-designated location other than a local exchange switching center. There was an implicit mutual exclusivity, therefore, between Type 2006 and Type 2001 channels. This is not to say, however, that they were per force unlike in all cases since Type 2001 channels frequently were used by customers in switched-network configurations which provided access to local exchange switching just as in the case of Type 2006 channels. Nor is this to say that any important engineering or technical distinctions existed between the two channel types, since each comprehended the use of standard voice-grade channels. As we noted, *supra*, however, technical equivalence in itself is not determinative of like service questions. In the same vein, administrative factors do not enter into the like service equation unless they directly affect the nature of the communications service obtained by the customer, either materially or perceptively.

18. Despite this, GSA makes arguments clearly at odds with established like service test standards. To wit, it argues that both channel types are engineered to meet the same bandwidth and signalling parameters, that pricing

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[10] *See* New York Telephone Co. v. FCC, 631 F.2d 1059, 1065-66 (2d Cir. 1980), *aff'g* New York Tel. Co., 76 FCC 2d 349 (1980).

[11] *See, e.g.*, Chickasaw Tel. Co., 26 FCC 2d 438 (1970).

[12] GSA cites Webster, *Third New International Dictionary* and Funk & Wagnall, *Standard College Dictionary*.

[13] The functional equivalency test for likeness has been repeatedly upheld by the courts, most recently in AT&T Communications, Revisions to Tariff FCC No. 12, 4 FCC Rcd 4932, recon. denied, 4 FCC Rcd 7928 (1989), reversed and remanded sub nom. MCI v. FCC, 917 F.2d 30 (D.C. Cir. 1990).

[14] Type 2006 channels, like other Series 2000 channels, could have more than one station termination at a given end. In such cases, Type 2006 channels could be arranged to have one station termination at a telephone company exchange switch and another, for example, terminated at a customer premises where it could operate alternately in a point-to-point mode without direct access to the local exchange network.

practices are identical for each channel type, and that both Type 2001 and Type 2006 channels can be arranged for alternate use. GSA attempts to buttress its argument on pricing similarities by pointing to the fact that historically, Types 2001 and 2006 channels have been priced identically so that it should follow that any pricing change made in one should always apply to the other. In so doing, GSA attempts to raise this pricing argument to the highest level of importance in the final determination of likeness.[15]

19. With respect to issues relevant to the functional nature of the service, GSA argues that Type 2001 channels, just (as their Type 2006 counterparts, terminate in switches which provide access to local exchange calling areas. The only differences between the two, according to GSA, are the number of potential subscribers that can be reached and the fact that 2001 lines use PBXs or Centrex instead of direct connections to the local exchange switch. GSA further avers that the choice of whether to use Type 2001 or 2006 channels to reach particular locations was made based on AT&T's recommendations, and these recommendations, in turn, were based solely upon engineering and FTS traffic considerations. GSA's observations on the similarities in use of service are well taken, since, as we noted, *supra*, most Type 2001 channels were connected on at least one end to a switch capable of obtaining access to local exchange areas. In the case of FTS, Type 2001 channels were used as trunks between the main, or backbone, FTS switches, and also as access lines to connect to customer stations at various government locations. These customer stations are generally served by either an on-premises PBX sometimes called a satellite or tributary PBX, depending on its status in the switching hierarchy, or by a Centrex switch generally located at the telephone company central office. The majority of FTS stations are served by Centrex. Either the PBX or Centrex is normally capable of providing automatic access to the local exchange area in which it is located. Clearly, then, although another switching node may be involved in the case of Type 2001 channels, [16] a user placing a call into a local exchange area from an FTS station would probably perceive no difference between Type 2001 and Type 2006 channel usage. In some cases, however, Centrex or customer PBXs may be intentionally arranged to block calls made over Type 2001 channels which attempt to dial through to local exchange numbers. This is usually done for traffic control and network efficiency purposes. Type 2006 channels, on the other hand, always permit access to the local exchange. In other cases, a manual operator position may still be required to "patch" Type 2001 calls through where automatic, direct inward and outward dial PBXs are not available. This is not the case with Type 2006 FX lines. Nonetheless, GSA has made a plausible argument that many Type 2001 service applications were perceived by users to be like Type 2006 applications.

20. GSA does not mention, however, the many uses to which Type 2001 channels could be applied which could not be matched by Type 2006 channels. First, as noted, *supra*, Type 2001 channels could be used in strict point-to-point configurations where no switching was involved. Secondly, calls made on FTS over Type 2001 channels could terminate at on-network points by dialing FTS seven-digit numbers which uniquely addressed specific government locations on the FTS network. These are not the same number codes used by the local exchanges and are not recognized as part of the nation-wide telephone numbering plan. Further, to place a call to an on-network FTS station from another requires only a seven-digit number since no three-digit area code is required, regardless of geographical location. These on-network stations could not be reached through Type 2006 channels except by dialing the local exchange number assigned to that station by the telephone company. In other words, Type 2006 channels could not be used to make on-network calls using the unique FTS numbering plan. Clearly, customers perceive a difference between different services if they must use different telephone numbers and, in some cases, a different number of digits.

21. Finally, and perhaps most important, FTS calls placed over Type 2001 channels in many cases reached the local exchange through government-owned PBXs rather than telephone company Centrex. It cannot be said, therefore, that in such cases Type 2001 channels are like Type 2006 since like service determinations relevant to Section 202(a) of the Act must look to only the service provided by the carrier. This constitutes a material functional difference, regardless of whether customers perceive the services to be like. To view this otherwise would in effect enable customers, through the use of their own devices, to make virtually any telecommunications service like another provided by the same carrier, especially since the time when equipment and service interconnections have been freely permitted under the tariffs.

22. Because of our above findings with respect to the like services issue, there is no need for us to reach the second issue; i.e., whether some or all of the GSA channels at issue extend between contiguous exchanges. Since we do not find liability on the part of defendant, this question is now moot.

V. CONCLUSION AND ORDERING CLAUSE

23. We agree with defendants' claim that GSA has failed to meet its burden here. Although GSA has shown that in certain cases, Types 2001 and 2006 appear to be like one another, it has failed to address the numerous instances and conditions under which these channels were used in functionally dissimilar ways.

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[15] GSA also states that its conclusions with respect to like services is consistent with the Commission's findings in *DOD v. C&P*, where we stated, *inter alia*, that the generally applicable interstate private-line rates in Tariff 260 appeared to be inappropriate for short-haul channels. Our conclusion in *DOD v. C&P*, however, was that the status quo should be maintained; i.e., short-haul services obtained under state tariff would remain under state tariffs until such time as suitable short-haul interstate tariff rates were developed. We specifically declined to require that short-haul channels being served under interstate tariffs be transferred to the state tariffs. *DOD v. C&P* at para. 16.

[16] Type 2006 channels connect directly to the local exchange switch whereas Type 2001 channels which, for example, terminate at a PBX would be switched automatically through the PBX to the local exchange switch, adding an additional switching level. The user, however, would normally perceive little difference, as the added delay is minimal.

24. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 202 and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 202(a) and 208, and pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned complaint filed by the General Services Administration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-618

In re Applications of

HEART OF THE LAKES BROADCASTING File No. BPH-881221MO

For Construction Permit for a
New FM Station on Channel 281C2
in Pelican Rapids, Minnesota

Appearances

John E. Fiorini III and *Catherine M. Withers*, on behalf of Heart of the Lakes Broadcasting; and *James W. Shook*, on behalf of the Chief, Mass Media Bureau.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: October 10, 1991; Released: October 16, 1991

PRELIMINARY STATEMENT

1. Three applications were designated for hearing in this proceeding to select a permittee for a construction permit for a new FM Station on Channel 281C2 in Pelican Rapids, Minnesota. Only the application of Heart of the Lakes Broadcasting (Heart) remains. Heart's application could not be granted because of an unresolved air hazard issue designated against it. *Hearing Designation Order*, DA 90-1785, released January 28, 1991. On October 1, 1991, Heart filed a Petition for Leave to Amend containing a determination of the Federal Aviation Administration (FAA) that its proposed tower will not constitute a hazard to air navigation. Heart filed on the same date, a motion for summary decision on the air hazard issue in this case.

FINDINGS OF FACT

2. Heart has received an FAA determination of no hazard to its proposed tower site. There remains no genuine issues as to any material fact in this proceeding. The designated air hazard issue is resolved in Heart's favor.

CONCLUSIONS

3. The air hazard issue is resolved in Heart's favor. There are no other basic qualifying issues pending against Heart. Heart's application is granted.

Accordingly, IT IS ORDERED, That the Petition for Leave to Amend, and the Motion for Summary Decision ARE GRANTED and the application of Heart of the Lakes Broadcasting for a construction permit for a new FM Station on Channel 281C2 in Pelican Rapids, Minnesota IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-132

In the Matter of

Competition in the Interstate
Interexchange Marketplace

REPORT AND ORDER

Adopted: August 1, 1991; Released: September 16, 1991

By the Commission: Chairman Sikes issuing a statement; Commissioner Quello dissenting in part and issuing a statement; Commissioners Marshall, Barrett and Duggan issuing separate statements.

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I. INTRODUCTION

1. On April 13, 1990, we released a Notice of Proposed Rulemaking to examine the state of competition in the interstate interexchange market and adapt our regulatory policies, as appropriate, to reflect this competition.[1] We now adopt some of the proposals in the Notice and modify Part 61 of our rules accordingly. Specifically, we further streamline our tariff regulation of certain of AT&T's business services, and we authorize interexchange carriers (IXCs) to offer services pursuant to individually negotiated customer contracts that are generally available to

[1] Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd 2627 (1990).

other similarly situated customers.[2] We also amend certain regulations governing AT&T's provision of customer premises equipment (CPE) and enhanced services, but retain the current CPE bundling and network disclosure rules. We believe that these reforms will benefit consumers by unleashing competitive forces in market segments where such forces are strongest.

II. BACKGROUND

2. We last completed a rulemaking that focused on the competitiveness of long-distance services several years ago.[3] In that proceeding, we decided to "forbear" from exercising full Title II regulation of AT&T's competitors in the long-distance industry, while retaining our full panoply of regulatory requirements for AT&T. These decisions were based upon a finding that AT&T possessed substantial market power in the provision of transmission services and that its competitors did not.

3. Since *Competitive Carrier*, the long-distance industry has undergone considerable changes and grown substantially more competitive. We initiated this proceeding, in light of these changes, to take a fresh look at the state of competition in the interstate interexchange marketplace and to adapt our regulatory policies, as appropriate, to reflect current market realities.

4. Our Notice of Proposed Rulemaking tentatively concluded that there is increasing competition in the interstate interexchange marketplace as a whole, and that competition in services used primarily by large businesses is especially intense. Based on these tentative conclusions, the Notice proposed a phased-in package of regulatory reforms.

5. The Notice proposed, first, to apply "maximum streamlined" regulation to certain of AT&T's business services - specifically, those in the Business Services Basket (Basket 3) under price cap regulation and those outside of price cap regulation.[4] Under maximum streamlining, tariffs could become effective on one day notice and without the filing of cost support. Price cap ceilings, floors, and rate bands would no longer apply to those services. The Notice proposed to extend maximum streamlining to AT&T's 800 services when 800 numbers become portable, and to AT&T's operator services when barriers to effective competition in operator services are removed. In addition, the Notice proposed future streamlining of AT&T's international message telephone service (IMTS) and sought comment on whether IMTS streamlining might be appropriate in January 1993. The Notice proposed to defer consideration of changes for AT&T's message telephone service (MTS) and ReachOut America services until our scheduled review of AT&T price cap regulation in 1992-93.

6. The Notice proposed, second, to provide AT&T with greater freedom to meet customer needs by making individually negotiated offerings. The Notice set forth two possible approaches -- a contract carriage proposal under which all IXCs would be permitted to offer common carrier service on a contractual basis, and a private carriage proposal under which common carriers would be permitted to offer a limited amount of service on a private carriage basis.

7. The Notice proposed, third, various changes in rules governing AT&T's provision of CPE and enhanced services. Specifically, the Notice proposed to: (1) eliminate nondiscrimination reporting requirements for services subject to maximum streamlined regulation; (2) relieve AT&T of the obligation to obtain an annual outside audit of its installation and maintenance procedures; and (3) relieve AT&T of comparably efficient interconnection (CEI) requirements for enhanced services, the network components of which are subject to maximum streamlined regulation. In addition, the Notice invited comment on whether AT&T should be permitted to bundle CPE with business services and promotional offerings and on whether current network disclosure requirements applicable only to AT&T should be modified or eliminated.

III. DISCUSSION

8. In this decision, we affirm our tentative conclusion that the growth of competition in the business services segment of the long-distance marketplace warrants regulatory changes. [5] While we recognize that the long-distance marketplace is not perfectly competitive, we conclude that competition for most business services is sufficiently effective to permit the changes adopted herein.[6] Specifically,

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[2] *See* 47 C.F.R. § 61.3(m) as amended herein.

[3] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54 (1983); Second Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17308 (1982); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 46791 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983); Fourth Further Notice of Proposed Rulemaking, 49 Fed. Reg. 11856 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *rev'd and remanded sub nom.*, MCI Telecommunications Corp. v. FCC,765 F. 2d 1186 (D.C. Cir. 1985) (hereinafter *Competitive Carrier)*.

[4] AT&T's Basket 3 services include ProAmerica; WATS; Megacom; SDN; other switched services; voice grade and below private line service; and other private line service. 47 C.F.R. § 61.42. Services outside of price caps for which maximum streamlining was proposed include AT&T's Tariff 12 services; ACCUNET packet switched service; Skynet KU, and all other services outside of price cap regulation, except for non-IMTS international service, which is already subject to streamlined regulation. *See* 5 FCC Rcd at 2641, para. 116 and at note 151.

[5] Our discussion of "business services" focuses on services outside of Baskets 1 (Residential and Small Business Services) and 2 (800 Services) under price cap regulation, including services outside of price cap regulation. *See* Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3033-37, 3051-65 (1989). We separately address services within Baskets 1 and 2.

[6] Noting that the Commission has previously held that "all interstate, domestic, interexchange telecommunications services comprise a single relevant product market with no relevant submarkets", AT&T argues that all of its services should be deregulated because "none can be distinguished for continued regulation." AT&T Comments at IV, *citing* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fourth Report and Order, 95 FCC 2d 554,564 (1983). MCI, in turn, replies that if indeed there is a single market for all domestic interstate telecommunications services, then none of AT&T's services can be

we conclude that the costs and burdens associated with detailed advance tariff review procedures for such services outweigh their benefits to the public. We also find that IXCs should be permitted to offer services pursuant to individually negotiated customer contracts that are generally available to other similarly situated customers.[7]

9. Our decision here is consistent with the Commission's previous market analysis in the *Competitive Carrier* decisions, in which the FCC concluded that IXCs other than AT&T lacked the market power to discriminate unreasonably or otherwise charge unlawful rates, and, therefore, should not be subject to burdensome, unnecessary regulatory oversight. We now find that market changes subsequent to our *Competitive Carrier* decisions compel a similar -- though more measured -- conclusion in this proceeding. Upon careful consideration of the benefits and burdens of our present regulations, and based on our finding that competitive marketplace forces make it unlikely that unlawful business services tariffs will be filed by AT&T, we find that detailed advance regulatory scrutiny of most of AT&T's business services tariffs is no longer necessary. Instead, the public interest will be best served by more limited advance review of AT&T's business service filings, coupled with current post-effective review procedures, including the complaint process and our authority to initiate investigations and find tariffs unlawful after they take effect.

A. Regulatory Treatment of Business Services

(1) Assessment of Competition for Business Services

(a)The Notice

10. The Notice tentatively concluded that the long-distance marketplace is increasingly competitive and that competition for most business services, in particular, is especially vigorous. In support of this tentative conclusion, the Notice cited the apparent excess supply capacity of many of AT&T's competitors, as well as factors specific to the business services marketplace. These included: (1) the sophistication of business customers; (2) their relative bargaining power in the marketplace; (3) studies indicating that AT&T's market share for business services could be as low as about fifty percent; (4) empirical data on pricing trends for long-distance services; and (5) trade press accounts documenting the success of AT&T's competitors in winning large business customers. [8]

(b) Positions of the Parties

11. AT&T, NTIA, DOJ,[9] and users such as Ad Hoc, the Bank Coalition, the Broadcast Companies, API, and the SDN Users support our tentative conclusion that business services are subject to intense competition. In addition, ICA offers qualified support. On the other hand, AT&T's competitors and CFA, TCA, and SBA (which filed on behalf of small IXCs and small business users) contend that the Notice overstates the competitiveness of business services.

12. Discussion in the record on the competitiveness of long-distance services generally and of business services in particular focuses largely on: (1) AT&T's market share and the three-firm concentration ratio of the long-distance marketplace; (2) the extent to which AT&T's competitors have excess supply capacity; (3) the demand-elasticity of AT&T's customers; (4) the cost structures of various IXCs and, in particular, whether AT&T faces a lower access cost structure; (5) the disparity in resources between AT&T and its competitors; (6) the extent of competition in rural areas served by AT&T; and (7) the competitiveness of private line services.[10] We discuss the record with respect to each of these issues below.

i. Market Share and Concentration

13. AT&T denies the importance of market share data to an evaluation of long-distance competition, but argues that its declining market share evidences its inability to exercise market power. It claims that its losses have been most significant in switched services outside of Baskets 1 and 2 and that its share of switched minutes for these services fell to 49 percent for the fourth quarter of 1989.[11] It states that its share of revenues for domestic, interstate, outbound, switched services declined to 47 percent at the end of 1990.[12] AT&T states that its share of revenues for all domestic interstate outbound services -- switched and nonswitched -- was 51 percent at the end of 1990. In addition, it claims that its 1990 share (in revenues) of the lower volume Basket 3 services -- Pro America and WATS

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deregulated any further because that market is not yet sufficiently competitive to warrant deregulation as a whole. MCI Reply at 8. DOJ and CompTel urge us to recognize that various service groupings comprise economically distinct products, while other parties recognize that different services are subject to different levels of competition. *See, e.g.* Sprint Comments at 105-6. To implement the regulatory changes we adopt here, we need not address whether, in strict economic terms, all domestic interstate, interexchange services continue to comprise a single product market. Contrary to the arguments of AT&T and MCI, the existence of one market does not require either that we treat all services in that market identically for regulatory purposes, or that we find all services in that market equally competitive before adopting regulatory changes for one subset of services. Thus, for example, in the price cap proceeding, we adopted price cap regulation for many, but not all, of AT&T's services. We then divided those services subject to price cap regulation into three separate baskets, in part to avoid cross-subsidies between groups of services that we recognized might be subject to differing levels of competition. We also did not apply precisely the same regulation to the services in the three baskets.

[7] *See* 47 CFR §61.3(m) as amended herein. *See also* note 170 *infra*.

[8] 5 FCC Rcd at 2634, 2635.

[9] DOJ filed its Reply ten days after the deadline for reply comments and asks that we accept this Reply. Since acceptance of DOJ's Reply would serve the public interest and no party would be prejudiced thereby, we grant this request.

[10] The Public Service Commission of the District of Columbia states that in assessing competition in the marketplace we should also consider factors such as cross-elasticity studies, economies of scale studies, and cost studies showing whether or not cross-subsidization exists. D.C. PSC Comments at 2-3.

[11] AT&T Comments at 25-26, n. ***.

[12] *See ex parte* letter from Joel Lubin, Regulatory Vice President, Government Affairs, AT&T, to Donna Searcy, Secretary, FCC, June 14, 1991. This includes all domestic, interstate, outbound switched service usage, including Basket 1 usage. AT&T states that its share of Basket 3 international service revenues approximates 57 percent. *Ex parte* letter from Joel E. Lubin, Regulatory Vice President, Government Affairs, AT&T, to Donna Searcy, Secretary, FCC, July 25, 1991. AT&T states that its share of inbound services was about 78 percent in 1990. AT&T Comments at 33.

service - was 55 percent. [13] DOJ states that a market share of 50 percent, "though by no means low, is below the level usually associated with market power." [14]

14. Some IXCs argue that AT&T's 67 percent share of 1989 toll revenues is inconsistent with a competitive market. [15] According to CompTel, a firm with a 40-50 percent market share and only much smaller rivals is generally considered dominant. [16] These parties also argue that there is substantial evidence that AT&T's market share is no longer declining. They contend that many of the factors that accounted for AT&T's previous market share losses, such as widescale equal access conversion and AT&T's inexperience in marketing in a competitive environment, no longer prevail. [17] They also argue that price caps and Tariff 12 have provided AT&T with greater flexibility than it had previously. [18]

15. IXCs argue, further, that AT&T's losses in market share have been neither dramatic nor remarkable. Some parties also maintain that AT&T may be managing its own market share -- selling off market share to maximize short-term profits and/or hasten deregulation. [19]

ii. Supply Capacity

16. Sprint and other IXCs assert that the Notice incorrectly assumes that raw fiber is the practical equivalent of supply capacity and that once a carrier has incurred the expense of laying fiber, the marginal costs of deploying it are low. Sprint submits a study that purports to show that fully provisioning its fiber network would take seven to eight years and an investment of from $6.6 billion to $10.4 billion. [20] AT&T submits results of a Bell Labs study finding that MCI, Sprint, and NTN could absorb all of AT&T's switched traffic and most of AT&T's private line traffic within eighteen months for an initial start-up investment of $3.1 billion. AT&T claims that this amount is commensurate with recent capital expenditures of these carriers. [21]

17. In reply, Sprint and CompTel claim that the Bell Labs study is based on several invalid assumptions. Sprint, focusing on the switched access component of the study, claims that the demand model is flawed: that it overstates Sprint's existing network capacity by overstating Sprint's transmission speeds; that it overstates the amount of dark fiber in Sprint's network; that it underestimates the trunking requirements that would be created by network expansion; that it understates the time required for the introduction of new switches into the network; and that it overstates the extent to which existing billing systems could accommodate a dramatic network expansion. [22] CompTel, addressing primarily the special access conclusions of the study, argues that the study: erroneously treats the National Telecommunications Network (NTN) as if it were a single company; [23] ignores the merger of Telecom*USA with MCI; overstates the capital available to NTN members; and understates the expense that would be involved in absorbing all of AT&T's private line demand. [24]

18. DOJ claims that neither the Sprint study nor the Bell Labs data submitted by AT&T address the real issue, which is whether AT&T's facilities-based competitors could accept, at a reasonable cost, sufficient additional traffic immediately or in the relatively near term to make a small but significant and nontransitory AT&T price increase unprofitable. [25] Following this criticism, AT&T submitted a more detailed description of the Bell Labs conclusions. According to AT&T, the Bell Labs study demonstrates, further, that both MCI and Sprint could begin adding capacity to their networks within three months and could, together, add almost thirty billion minutes of new capacity within six months. [26] AT&T also submits two additional studies, both of which address competitors' existing capacity. The first study purports to show, based on a comparison of AT&T, MCI, and Sprint asset turnover ratios, that MCI and Sprint have, respectively, 8.7 billion and 10.1 billion minutes of excess ca-

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[13] *Ex parte* letter from Joel E. Lubin, Regulatory Vice President, Government Affairs, AT&T, to Donna Searcy, Secretary, FCC, July 25, 1991.

[14] DOJ Reply at 27.

[15] AT&T's share of toll revenues decreased to 65 percent during 1990. Long Distance Market Shares: First Quarter, 1991, Industry Analysis Division, FCC, June 28, 1991, Table 4.

[16] CompTel Comments, Appendix C, John E. Kwoka," Competition and Dominance in Interexchange Telecommunications", June 1990, at 9 (hereinafter "Kwoka").

[17] Sprint Comments at 52-53; ITI Comments at 10; Kwoka at 15-16.

[18] Total Tel Comments at 5; MCI Comments at 28; Mid-American Comments at 7.

[19] CompTel Comments at 27; Kwoka at 12.

[20] Sprint Comments at Appendix 10; Sprint Reply at 9. According to Sprint, additional "customer service" and "general and administrative" expenses of at least $2 billion would also have to be incurred. Sprint Comments at 69-70.

[21] AT&T Comments at 13, n. *, Appendix A.

[22] Sprint Reply at 9-25.

[23] NTN is a consortium of IXCs that share use of each other's facilities.

[24] CompTel also faults the study for overlooking the marginal cost of access. According to CompTel, "reliance on excess capacity as a restraint on AT&T only holds validity 'if the incremental cost of its use -- primarily access cost -- is comparable to AT&T.'" CompTel Comments at 45, *quoting* Gillan Associates,"Access Costs and Interexchange Market Structure: An Evaluation of Access Cost Structures Facing AT&T and its Rivals," June 1990, (hereinafter "Gillan Study") at 3, attached as Appendix E to CompTel Comments. As discussed below, however, CompTel does not show that its members currently pay higher access charges than AT&T. Moreover, CompTel does not show that its members would face higher incremental costs than AT&T in serving additional traffic. While the Gillan study does indicate that CompTel members might face higher transport costs in certain geographic areas (that they may or may not now serve) if they used existing small IXC facilities in those areas, CompTel members could grow in whole or in part by expanding traffic volumes in lower-cost areas. Moreover, AT&T's competitors would presumably find it economical to build new points of presence (POPs) if they gained large numbers of new customers. While the Bell Labs study does not include the costs of these additional POPs, an IXC would not be required to add POPs in order to take on new traffic. It would presumably do so only when its increased traffic volumes made additional POPs economical. The cost of these additional POPs are therefore not properly viewed as a supply constraint. *See also* para. 58, *infra*.

[25] DOJ Reply at 22-23. Under DOJ's Merger Guidelines, a five percent price increase lasting one year is ordinarily considered a "small but significant and non-transitory price increase." DOJ Merger Guidelines § 2.11; DOJ Reply at n. 20.

[26] *Ex parte* letter from Joel Lubin, Regulatory Vice President, Government Affairs, AT&T, to Donna Searcy, Secretary, FCC, December 5, 1990.

pacity on hand. [27] The second study concludes, based on an examination of calling patterns and peak call volumes, that MCI and Sprint together could immediately absorb fifteen percent of AT&T's business day traffic (*i.e.*, AT&T's calling volume Monday to Friday, 8AM -10PM). This latter study finds that while MCI and Sprint temporarily might have to overflow a certain amount of peak traffic to AT&T, they could handle at least 93 percent of the additional traffic with their existing capacity. [28]

iii. Demand-Elasticity of AT&T customers

19. Some parties take issue with the Notice's tentative conclusion that business customers are demand-elastic. [29] For example, CompTel argues that AT&T has an advantage in the marketplace because of its established relationships with customers. [30] Other AT&T competitors, citing their history of inferior access, as well as AT&T's continuing advantages in certain markets, such as 800 and operator services, claim that many customers cling to the perception that AT&T's competitors offer inferior and less convenient services. [31] They argue that AT&T perpetuates this perception through ad campaigns painting AT&T's competitors as the "wrong" choice. They maintain that it is very difficult to fight these perceptions since AT&T's advertising budget is so much larger than their own. [32]

20. To support these claims, Sprint describes a 1990 Morgan Stanley survey in which large users ranked AT&T above its competitors in overall quality, reliability, and speed in responding to problems. [33] Sprint states its own data indicate an even greater customer bias towards AT&T. These data, it states, demonstrate that even large business customers may not be sophisticated and knowledgeable about interexchange telecommunications services. [34] For example, it states that 28.3 percent of AT&T's commercial customers spending $10,000 or more on long distance service per month preferred AT&T over Sprint on the basis of compatibility with "regular telephone service." [35] Sprint claims, further, that AT&T's retention of a 60+ percent market share despite prices that are often at least 10 percent higher than those of its competitors is proof that many long-distance customers are demand-inelastic. [36]

21. TCA and ICA also claim that the Notice overstates users' demand elasticity. They argue that it is becoming increasingly costly to change carriers, both because of the arduous negotiation process and because of the increasingly specialized nature of user applications. [37]

22. AT&T, DOJ, API, Ad Hoc, and the Bank Coalition dispute assertions that AT&T's large business customers are demand-inelastic. AT&T argues that the willingness of its customers to switch carriers is evident from its declining market share and the increased tendency of large business customers to use multiple IXCs. [38] AT&T also submits several surveys which, it claims, evidence the demand-elasticity of large users. In one such survey, conducted by the Wall Street Journal in July 1990, ICA members were asked: "If your company is considering changing its major domestic and/or international transmission suppliers, which of the following will be considered as new suppliers?" While 58 percent responded AT&T, 67 percent responded MCI, 56 percent responded Sprint, 22 percent responded Williams, 13 percent responded Cable and Wireless, and 5 percent responded NTN. [39] In another survey of large users, about two thirds of respondents reported that they had used consulting firms in their telecommunications planning efforts. [40] In addition, AT&T submits a November 1989 Datapro survey in which users rated AT&T, MCI, and Sprint roughly equal in overall quality. [41]

23. AT&T also submits two surveys conducted by outside entities on behalf of AT&T. One, a Louis Harris and Associates study, finds that 96 percent of large businesses and 92 percent of medium-sized businesses feel they have a choice between competing long-distance services. [42] The other, a survey conducted by National Economic Research Associates (NERA), summarizes the results of interviews with executives of fourteen of the largest telecommunications users about their perception of the long-distance marketplace and various carriers participating in it. These users uniformly characterize the long-distance market as highly competitive and indicate that they shop aggressively among multiple IXCs for the best possible prices and service. [43]

24. Similarly, Ad Hoc states that its members have shifted a significant portion of their traffic to MCI, Sprint and other carriers and that a substantial number of members have designated MCI or Sprint as their primary

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[27] *Id.*

[28] *Ex parte* letter from Joel Lubin, Regulatory Vice President, Government Affairs, AT&T to Donna Searcy, Secretary, FCC, February 27, 1991.

[29] As used herein, "demand elasticity" is the propensity of AT&T's customers to switch carriers or otherwise decrease the amount of services they purchase from AT&T in response to relative changes in price and quality.

[30] CompTel Comments at 39.

[31] *See, e.g.*, Sprint Comments at 80-81.

[32] Sprint Comments at 85-88. *See also* CompTel Comments at 39.

[33] Sprint Comments at 83.

[34] Sprint Comments at 79-81. *See also* ACTA Comments at 11.

[35] Sprint Comments at 84. According to Sprint, misperceptions were much more common among AT&T's residential customers spending at least $50 per month on long-distance, 77.7 percent of which rated AT&T higher than Sprint based on compatibility with "regular phone service." *Id.*

[36] Sprint Comments at 84-85.

[37] TCA Comments at 8-10; ICA Comments at 7-8.

[38] AT&T Comments at 25-26, n. ***.

[39] 1990 Telecommunications Survey, Wall Street Journal, 1990, attached to *ex parte* letter from Joel E. Lubin, Director Federal Government Affairs, AT&T, to Donna Searcy, Secretary, FCC, October 4, 1990 (hereinafter AT&T October 4, 1990 *ex parte* letter). *See also* AT&T Reply at 36.

[40] Data Communications Issues and Consultant Usage Patterns Among Leading American Companies, Newton-Evans Research Co., March 1990, p. 11, attached to AT&T October 4, 1990 *ex parte* letter.

[41] User Ratings of Transmission Facilities, Datapro 1989 Data Communications Users Survey, November 1989.

[42] Long-Distance Marketplace, Louis Harris and Associates, Inc., August-September 1989, Study No. 892039, pp. 6-7, Table 7, p. 93, attached to AT&T October 4, 1990 *ex parte* letter.

[43] *Ex parte* letter from Thomas Norris, Corporate Vice President, Federal Regulation Division, AT&T, to Alfred C. Sikes, Chairman, FCC, May 15, 1991 (hereinafter "NERA Study").

carrier. Ad Hoc states that its members are now able to acquire interstate telecommunications services in much the same manner as they purchase other components of production -- by selecting among multiple providers who offer fully competitive prices and services.. [44] Likewise, API and the Bank Coalition assert that they (or their members) use or would consider using an AT&T competitor for some or all of their service needs. [45] API reports that in a survey of its members, all respondents stated that they routinely request and evaluate proposals from carriers other than AT&T for all of their service needs, and that there is no service for which they would consider AT&T to be the exclusive provider. [46] API cites a 1990 *Data Communications* survey which, it claims, demonstrates that users consider MCI and Sprint to be "on a par with AT&T in terms of quality of service." [47]

25. Ad Hoc and the Bank Coalition both state that large users increasingly divide traffic among multiple IXCs. Such arrangements, they claim, keep IXCs on their competitive toes and offer the added benefit of a redundant, disaster-free network. [48] DOJ asserts that the demand elasticity of large business customers -- in particular, their ability to substitute their own private networks for AT&T's transmission services -- is the most important factor constraining AT&T's ability to exercise market power. [49]

iv. IXC Cost Structures

26. Although no party submitted evidence on the overall cost structures of various IXCs, some IXCs argue that AT&T enjoys a favorable access cost structure. CompTel, for example, submits a study that purports to show that AT&T's switched access costs are on average 0.32 cents/minute of use lower than MCI's; 0.34 cents/minute of use lower than Sprint's; and 0.78 cents/minute of use lower than third-tier IXCs. [50] CompTel asserts that the annual value to AT&T of this switched access advantage approximates $700 million. [51]

27. CompTel claims that AT&T also enjoys a special access cost advantage. It states that customers pay, on average, $72 per month less to access AT&T's network using a single voice grade private line than to access other IXC networks, and $1088 less using high capacity DS1 access service. [52] According to CompTel, these access cost advantages derive from AT&T's more ubiquitous network and the excessive distance-sensitivity of local exchange carrier (LEC) access tariffs.

28. MCI and Sprint also claim that AT&T has a favorable access cost structure. MCI asserts that Shared Network Facilities Arrangements (SNFAs) between AT&T and the BOCs arising from divestiture enable AT&T to pay less for switched access than AT&T competitors pay and have provided AT&T with $2 billion in savings since divestiture. [53] Sprint claims that AT&T's traffic volumes uniquely enable AT&T to benefit from the substantial volume and term discounts available for local exchange carrier (LEC) high capacity DS3 special access. [54] Sprint also argues that AT&T has benefitted from recent increases in nonrecurring charges for special access, which make it more expensive for customers to switch IXCs.

29. Some IXCs claim that AT&T's access cost advantages will increase substantially with the expiration on September 1, 1991 of the Modification of Final Judgment's "equal charge per unit of traffic" requirement. [55] According to CompTel, the application of dedicated transport rates for switched access could save AT&T $1 billion and double its current access advantage. [56] CompTel and others urge us to incorporate the equal charge per unit of traffic requirement into Part 69 of our rules.

30. In reply, AT&T argues that CompTel's access cost study is flawed and that the study is contradicted by other studies that have found a reverse correlation between IXC size and per-minute access charges. AT&T also faults CompTel for focusing exclusively on LEC transport charges and ignoring other access-related costs disproportionately borne by AT&T. [57] AT&T denies that it is advantaged by SNFAs and represents that, after 1991, it will no longer use SNFA contracts for transmission or switching facilities. Finally, AT&T argues that the expiring MFJ requirement was not intended to be permanent, but only to provide other IXCs with a transition period in which to construct their own networks. [58]

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[44] Ad Hoc Comments at 12.

[45] Bank Coalition Comments at 2; API Comments at 12, 16-17, 18-19.

[46] API Comments at 18-19. *See also* Broadcast Companies Comments at 2-3.

[47] API Reply at 16.

[48] Ad Hoc Comments at 11-12; Bank Coalition Comments at 4-5.

[49] DOJ Reply at 28-29.

[50] *See* CompTel Comments at 42-49 and Gillan Study at 1-13. *See also* Metromedia Comments at 6; ATC Comments at 6-7; Cable & Wireless Comments at 26-28; and MidAmerican Comments at 7.

[51] CompTel Comments at 49, Gillan Study at 12.

[52] CompTel Comments at 49-53, Gillan Study at 14-17. Customers purchasing special access pay the local telephone company for the facilities to access their IXC's local point of presence (POP). DS1 special access provides up to 24 voice-grade channels.

[53] MCI Comments at 23.

[54] Sprint Comments at 42-44. DS3 special access provides up to 672 voice-grade channels.

[55] *See, e.g.*, Sprint Comments at 98; CompTel Comments at 53-58, Gillan Study at 17-21; ATC Comments at 6-7; Cable & Wireless Comments at 26-28. This rule requires that Bell Operating Company (BOC) access charges be based on averaged costs, without regard to whether the traffic moves over dedicated or common trunks. Although FCC rules require separate rate elements for dedicated and common transport, these FCC rules were indefinitely waived in 1983. American Telephone & Telegraph Company, Petition for Waiver of Sections 69.1(b), 69.3(e), 69.4(b)(7) and (8), 69.101, 69.111 and 69.112 of the Commission's Rules and Regulations, 94 FCC 2d 545,547 at para. 4 (1983) ("Waiver Order") (waiver set to expire on December 31, 1984); Reconsideration Order, 97 FCC 2d at 862 (1984) (waiver extended through May 31, 1985); MTS and WATS Market Structure, Memorandum Opinion and Order, CC Docket No. 78-72, Phase I, FCC 85-87, 50 Fed. Reg. 9633 (1985) (waiver extended until further notice).

[56] The Part 69 access charge rules contain instructions for the computation of a dedicated transport rate which have never been implemented because the Commission waived the rule before the initial access tariffs were filed. *See* note 55, *supra*. CompTel has estimated the rates that would result if those rules were applied.

[57] *See* para. 53, *infra*.

[58] AT&T Reply at 23-33.

v. Resource Disparity & Financial Strength

31. Some IXCs cite resource disparity and financial strength as other factors that confer market power on AT&T.; [59] They argue that because of its size, AT&T enjoys significant, that AT&T maintains certain technical advantages, such as faster call set-up and more direct interconnections with LEC end offices. [60] They argue that AT&T obtained these advantages not because of superior efficiency, but because of its previous government-sanctioned monopoly. In reply, AT&T argues that all firms need not be equal for a market to work. What characterizes competition, it claims, is a process in which firms seek to develop their own advantages. Thus, it states, the issue is not whether AT&T has advantages, but whether any of those advantages precludes the effective functioning of the market. [61]

vi. Competition in Rural Areas

32. TCA, Arkansas, and Sprint assert that AT&T does not face effective competition in rural areas. TCA and Sprint claim that because of the cost of extending service to nonurban areas relative to the number of customers an AT&T competitor could reasonably hope to attract, AT&T can charge supracompetitive prices in such areas without attracting entry. [62] They argue that while geographic rate averaging provides protection to customers in rural areas, single customer offerings, such as Tariff 12, have undermined rate averaging. [63] TCA and Arkansas state that the lack of equal access in many rural areas prevents AT&T's competitors from meeting the needs of sophisticated national users that have one or more offices in non-equal access areas. [64] NTIA states that geographic rate averaging will constrain the exercise of market power in rural areas where AT&T is the only long-distance carrier.

vii. Private Line Services

33. IDCMA, Sprint, MCI, CompTel, and TCA assert that private line services are less competitive than other business services. IDCMA, citing a study by Computer Intelligence Corporation, claims that in 1989, AT&T maintained an overall market share of 90 percent for private line services. [65] CompTel asserts that AT&T's private line market share is 74 percent. [66] Sprint, MCI, and TCA claim that AT&T has cost advantages in the provision of private line services attributable to its economies of scale. Sprint and TCA, for example, argue that AT&T is better able than other IXCs to take advantage of the volume discounts associated with DS3 access facilities. [67] They claim, further, that high nonrecurring charges imposed by LECs make it uneconomical for many users to switch IXCs, and thereby favor AT&T as the incumbent carrier with the largest embedded customer base. [68]

34. Ad Hoc, the Broadcast Coalition, and ICA argue that all business services are highly competitive, with the sole exception of analog private line services. [69] Citing the shrinking market for analog private line services, they state that IXCs are generally focusing their competitive efforts on other services. [70] Similarly, IDCMA claims that, in 1989, AT&T's market share for analog private line services was nearly 96 percent. [71]

35. AT&T denies that it has market power in any private line service. It states that the market share data submitted by IDCMA is unreliable. [72] It claims that its private line market share is, in reality, only 57 percent. [73] It states, further, that the excess supply capacity of its competitors in the private line market precludes the exercise of market power by any carrier. It also argues that its responses to the pricing initiatives of its competitors in private line services demonstrate the competitiveness of these services. [74]

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[59] *See, e.g.*, Sprint Comments at 98-103; Wiltel Comments at 8; CallAmerica Comments at 3-4; Total Tel USA at 3; ATC Comments at 7; ACTA Comments at 7-8; MCI Comments at 15-17. *See also* paras. 26-29, *supra*.

[60] *See, e.g.*, CompTel Comments at 63-64; Call-America Comments at 3-4; MidAmerican Comments at 7-8.

[61] AT&T Reply at 22-23.

[62] TCA Comments at 6. *See also* Sprint Comments at 115.

[63] TCA Comments at 7; Sprint Comments at 114-115.

[64] TCA Comments at 6. *See also* Arkansas Comments at 3.

[65] IDCMA Comments, Appendix A, at 24-26, Appendix B. Likewise, the Michigan PSC Staff, citing a study submitted in a recent docket, claims that AT&T has a 95 percent market share of interLATA private line services in Michigan. Michigan PSC Staff Comments at 5-6.

[66] *Ex parte* letter from James M. Smith, President, CompTel, to Donna Searcy, Secretary, FCC, July 24, 1991 (*citing* Yankee Group data).

[67] Sprint Comments at 42-43; TCA Reply at 28.

[68] Sprint Comments at 43-45; MCI Comments at 49-50; TCA Reply at 28.

[69] The Broadcast Coalition addresses Analog Terrestrial Television Transmission Service, rather than analog private line services generally. Analog Terrestrial Television Service is one of two analog private line services provided by AT&T. It is used by television networks to satisfy certain special service requirements -- like the backhauling of news or sports programming to facilities in New York for distribution to network affiliates throughout the country. According to the Broadcast Coalition, AT&T is currently the only provider of this service. Broadcast Coalition Comments at 21-22, n. 42.

[70] Ad Hoc Comments at 23; Broadcast Coalition Comments at 21-23. *See also* TCA Comments at 8-9.

[71] IDCMA Comments, Appendix A, at A-25. IDCMA argues that AT&T is transferring its market power in analog private line services to digital services by migrating its analog private line customers to digital private line services. *Ex parte* letter from Herbert E. Marks and David Alan Nall, Attorneys for the IDCMA, to Gary Phillips, Attorney, Policy and Program Planning Division, FCC, May 3, 1991.

[72] AT&T claims that the market share statistics on which IDCMA bases its comments have been "completely repudiated" by the company that developed the data. AT&T Reply at 37 and Appendix D. IDCMA counters by stating that while Computer Intelligence Corporation said that its database is "biased" and "non-projectable" only from a "purely scientific statistical point of view", it does provide as good a representation of communications products and services used as any other commercially available source of data. *Ex parte* letter from David Alan Nall, Attorney for IDCMA, to Richard M. Firestone, Chief, Common Carrier Bureau, FCC, November 20, 1990.

[73] *Ex parte* letter from Joel Lubin, Regulatory Vice President, Government Affairs, AT&T, to Donna Searcy, Secretary, FCC, June 14, 1991.

[74] AT&T Reply at 37.

c. Discussion

36. With minor exceptions, we now conclude that the business services market is substantially competitive. We base this conclusion in part on our finding that the business services marketplace is characterized by substantial demand and supply elasticities that limit AT&T's ability to exercise market power in this market segment. [75] We also rely on AT&T's pricing of business services under price cap regulation and unrefuted evidence that AT&T's market share is substantially lower in business services than it is in other markets. In reaching these conclusions, we are cognizant that AT&T is still by far the largest IXC and that it may have certain advantages in the marketplace by virtue of this fact. Nevertheless, such advantages do not negate the significant forces that are driving competition in this market segment. We discuss these conclusions in more detail below.

(i) Demand Elasticities

37. We now affirm our tentative conclusion that business customers are to a large degree demand-elastic and will switch carriers in order to obtain price savings and desired features. In the Notice, we noted that large users have both the incentive and ability to evaluate the full range of market options available to them. We stated that these customers tend to be more informed and sophisticated purchasers of telecommunications services than other customers and that they increasingly exercise their "buyer power" by soliciting competitive bids before procuring telecommunications services. The record corroborates these tentative conclusions.

38. Large user comments in this proceeding provide the most compelling evidence of the elasticity of their demand. Thus, large users state that before procuring telecommunications services, they routinely request proposals from carriers other than AT&T and accord full consideration to these proposals. [76] They state, moreover, that they consider the offerings of several of AT&T's competitors to be equivalent in quality to those of AT&T. [77] These comments are substantiated by various surveys of large users. The Wall Street Journal and Harris polls, as well as the API member survey, document the willingness of large users to consider IXCs other than AT&T for their long-distance telecommunications needs. The Data Communications and Datapro surveys show that customers view MCI and Sprint services to be similar in quality to those of AT&T. [78]

39. The record also supports our tentative conclusion that large users tend to be more sophisticated and knowledgeable purchasers of telecommunications services than other customers. In the Notice, we cited evidence that large users increasingly use telecommunications consultants in choosing services and service providers. More recent data, as reported in the Newton-Evans survey, confirm this trend. Of course, many large users employ in-house telecommunications experts as well. These factors are significant not only because they demonstrate that large users are aware of the multitude of choices available to them, but also because they show that these users are likely to make informed choices based on expert advice about IXCs' service offerings and prices. [79]

40. Not only is the elasticity of large users' demand evident from their comments and various surveys, it is documented by their behavior. Thus, AT&T's market share in the business services segment of the market is significantly lower than in other segments. Moreover, by all accounts, large users increasingly seek to divide their traffic among multiple carriers. [80] This positions them to play one carrier off against another at the negotiating table. Of course, as large users develop relationships with

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[75] Most all parties -- even those that disagree with our conclusions about competition in the marketplace -- agree that supply and demand elasticities are properly considered in an assessment of competition in the long-distance marketplace. *See, e.g.*, Sprint Comments at 33; ICA Comments at 6; Kwoka at 49; California Comments at 5; *cf.* MCI Comments at 14. *See also* Landes and Posner, Market Power in Antitrust Cases, 94 Harv. L. R. 937, 979 (1981); Krattenmaker, Lande, and Salop, Monopoly Power and Market Power in Antitrust Law, 76 Georgetown Law Review 241, 259 (1987).

[76] *See, e.g.*, Ad Hoc Comments at 12-13; API Comments at 18-19.

[77] API Comments at 14-17; Ad Hoc Comments at 12. *See also* NERA study at 62 (quoting Manager, Corporate Telecommunications, General Electric): "Sprint is a viable carrier. They're very high quality. MCI is a viable carrier. Their VNET service is excellent. And AT&T is a high-quality carrier. What's the difference between SDN, VPN, and VNET? Beats the heck out of me!"

[78] Sprint claims that a recent Morgan Stanley survey demonstrates the inelasticity of business customers' demands. *See* Sprint Comments at 83-84. Sprint states that in this survey, users ranked AT&T higher than MCI and Sprint in nine categories, and lower only in four "softer" categories. Some of these same "softer" categories, however, are the very categories that Sprint claims are accorded insufficient weight in *Data Communications* surveys. *Id.* at 82-83. More significantly, Sprint does not indicate how much higher AT&T was rated in the various categories. Sprint also describes its own survey data which, it claims, indicate an even greater customer bias in favor of AT&T. However, a closer examination of this data indicates that only 30.1 percent of non-exclusive AT&T customers spending $10,000 or more per month, and less than 40 percent of those spending $1500 to $9999 per month, rated AT&T's overall service higher than MCI's and Sprint's. *See* Sprint Comments, App. 15, Tables 11 and 14. Moreover, once again, Sprint only shows the percentage of customers that rated AT&T higher in various categories, without showing how much higher AT&T was rated. This omission is significant for two reasons. First, by Sprint's own admission, customers were asked to rate each carrier on a scale of 1 to 5 in various categories. Thus, Sprint could have provided the actual scores for each carrier instead of just the percentage of customers that rated AT&T highest. Second, other surveys, including the 1990 *Data Communications* survey, discussed above, indicate that even when customers rank AT&T higher in a particular category, the differences in the rankings are generally minimal. What is most telling in these surveys is not which IXC was ranked highest in the most categories, but just how close the rankings tend to be in virtually all categories.

[79] *See, e.g.*, Texas Reply at 2.

[80] Indeed, AT&T states that 58 percent of its revenues for switched business services come from companies that also buy services from one or more of AT&T's competitors. AT&T Comments at 25. AT&T also cites a 1988 ICA member survey that found that eighty percent of the firms queried used at least two transmission suppliers. AT&T Comments, App. B at 15, Michael E. Porter, Competition in the Long Distance Telecommunications Market: An Industry Structure Analysis, *citing*, Survey conducted by Erdo and Morgan, Inc., Feb. 17 to March 28, 1988. In addition, a Sprint executive has publicly stated that 737 of the 800 largest telecommunications users in the country use

carriers other than AT&T -- even if for only a portion of their traffic -- they will presumably become still more demand-elastic.

41. In reaching these conclusions, we do not discount the significance of AT&T's goodwill or deem it to be of no marketing value to AT&T. In any market in which relatively new entrants compete against one or more established incumbents, goodwill is bound to play a role, in some cases a prominent one. That does not mean, however, that these markets are not competitive, or that customers in them are necessarily demand inelastic. Particularly when, as is the case in the business services segment of the long-distance marketplace, customers tend to be sophisticated and aware of the choices available to them, the significance in the marketplace of name recognition and historic goodwill is reduced.

42. Nor does the size of AT&T's advertising budget relative to that of its competitors convince us that large users are demand inelastic. Indeed, considering AT&T's recent declines in market share, it may prove exactly the opposite: that customers *are* willing to switch carriers and that AT&T has to invest enormous resources to try and convince them not to switch. [81] Finally, we note that many of AT&T's competitors have invested considerable capital in expanding their supply capacity. These companies would not have done so if they were convinced that they would be unable to attract substantial numbers of new customers over time.

(ii) Supply Elasticities

43. There are two factors that determine supply elasticities in a marketplace. One is the supply capacity of existing competitors: if existing competitors have or can relatively easily acquire significant additional capacity, then supply elasticities tend to be high. The other factor is low entry barriers: even if existing suppliers lack excess capacity, supply elasticities tend to be high if new suppliers can enter the market relatively easily and add to existing capacity. [82] The Notice tentatively concluded that supply elasticities in the interstate interexchange marketplace are high because of the apparent excess supply capacity of existing competitors in the marketplace. We now affirm that tentative conclusion.

44. Our tentative conclusion in the Notice was based upon evidence that several of AT&T's competitors owned considerable amounts of raw transmission capacity. We recognized that raw transmission capacity is not the same thing as readily usable capacity and we asked for comment on the costs AT&T's competitors would have to incur in order to handle various levels of additional traffic. Sprint responded with a study concluding that it would take seven to eight years and a minimum of $6.6 billion to provision to full capacity its existing fiber network. This study, however, is not probative, because full deployment of Sprint's fiber network would provide it with far more capacity than it could possibly hope to utilize in the near-term, and certainly far more than would be necessary to constrain AT&T's market behavior. Indeed, according to AT&T, full provisioning of Sprint's fiber network would equip Sprint to handle as much as 257 to 513 billion minutes of traffic, depending on the line speed used. Even the low-end figure is well in excess of AT&T's total switched traffic volume for the year 1990.

45. AT&T's assertion that MCI and Sprint could, together, absorb all of AT&T's 1989 switched traffic in eighteen months at costs commensurate with their previous capital expenditures also suffers from the same flaw, though to a lesser extent. As DOJ observes, it is not meaningful to focus on the ability of AT&T's competitors to serve all, or even most, of AT&T's business, since AT&T would be unlikely to raise price to the point that it lost most of its business. The real issue is whether AT&T's competitors have enough readily available capacity to constrain AT&T's market behavior -- *i.e.*, whether they have or could quickly acquire the capacity to take away enough business from AT&T to make monopoly pricing by AT&T unprofitable. Put differently, the issue is whether AT&T's rivals have enough readily available capacity to compete head-to-head with AT&T on an ongoing basis for any business customer that comes along.

46. While AT&T's assertions about its competitors' long-term capacity do not address this issue, other data submitted by AT&T that focuses on short-term supply constraints does. First, AT&T's analysis of traffic volumes and peak traffic levels appears to demonstrate that MCI and Sprint could immediately absorb as much as fifteen percent of AT&T's business day traffic without any expansion of their existing capacity. [83] This capacity is in itself more than sufficient to constrain AT&T's pricing behavior insofar as it could accommodate a substantial number of new customers. Moreover, based on the Bell Labs study, it appears that in three to six months time MCI and Sprint could begin adding new capacity to their networks, reducing their need to overflow any traffic onto AT&T's network and increasing their own present and future capabilities. [84] Indeed, this study shows that within five months time, Sprint and MCI, together, could add about 25 billion minutes of new capacity to their networks for a combined investment of about $600 million. [85] These

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Sprint. *Network World*, March 27, 1989, p. 13 (*quoting* William Coyne, Vice President and General Manager, Northeast Division, Sprint).

[81] We are likewise unpersuaded by arguments that it is becoming more costly for users to change carriers because of the negotiation process or because of the increasingly specialized nature of user applications. The telecommunications marketplace is similar in this regard to scores of other markets in which customers negotiate for sophisticated products and services. Moreover, the ability of customers to negotiate for better prices and features is, in fact, evidence of the increased competitiveness of this market.

[82] *See, e.g.*, Illinois Reply at 4-5.

[83] AT&T's analysis of asset turnover ratios is less convincing because it assumes that its competitors have the same asset turnover ratio as AT&T. If its competitors have more excess capacity than AT&T, however, this would not necessarily be the case.

[84] Sprint claims that it would take at least eighteen months to begin adding new capacity to its network. This assertion, however, appears to be premised on the assumption that Sprint would be equipping its network to full capacity and that comprehensive network planning would therefore have to precede the addition of new capacity. Because we find this assumption to be unrealistic, Sprint's conclusions are flawed. In fact, the record indicates that an incremental migration of AT&T's customers could be initiated in a much shorter timeframe.

[85] *Ex parte* letter from Joel E. Lubin, Regulatory Vice President, Government Affairs, AT&T, to Donna Searcy, Secretary, FCC, December 5, 1990.

facts, taken together, establish that AT&T's competitors have substantial excess capacity available immediately and in the relative short-term.

47. Sprint and CompTel argue that the Bell Labs study is unrealistic. They argue that no competitor would undertake a crash expansion program in response to AT&T price increases because if AT&T lowered its prices in the midst of this program, its competitors would likely be left with vast amounts of unneeded capacity. These arguments assume that a massive capital investment would be necessary for AT&T's competitors to begin adding customers. The unrefuted evidence suggests, however, that Sprint and MCI can add a sufficient number of new customers with their existing capacity to constrain AT&T's pricing behavior and add incrementally to this capacity as new customers were gained.

48. Many of Sprint and CompTel's other criticisms of the Bell Labs study appear to be largely based on the assumption that AT&T's competitors would have to acquire AT&T's entire customer base within eighteen months. As noted above, this is an unrealistic scenario. Other criticisms appear to be inconsistent with either the study itself or publicly available data.[86] Even assuming them to be valid, however, neither Sprint nor CompTel shows that these criticisms would materially affect the bottom-line conclusion of the Bell Labs study.[87] In fact, Sprint's study, scaled-down to 75 million minutes, is substantially consistent with the Bell Labs study, assuming expansion occurs at a constant pace. Thus, while we need not address whether the dollar projections and timetables set forth in the Bell Labs study are absolutely perfect, we find the model to be generally rigorous, its application generally sound, and the bottom-line conclusion that AT&T's competitors could add substantial numbers of switched and special access traffic in a short period of time, well-supported. Based on this finding, we conclude that AT&T's competitors have enough readily available supply capacity to constrain AT&T's market behavior and inhibit it from charging excessive rates.

iii. Pricing and Market Share Data

49. While we base our finding of substantial competition in the business services segment of the long-distance marketplace in part on our analysis of supply and demand elasticities in this market, AT&T's pricing of business services since the implementation of price cap regulation lends additional support to our conclusion. After 638 tariff filings in the Business Services Basket (Basket 3), AT&T has yet to exceed the price cap ceiling for that Basket. Moreover, all but one of AT&T's Basket 3 filings have been below the applicable upper service rate band.[88] AT&T's ProAmerica service, the lowest volume service in the Business Services Basket, has been priced substantially below its upper rate band. We believe that these lower-than-required prices for Basket 3 services reflect the competitiveness of business services.

50. We also note that AT&T's market share, both in terms of revenues and minutes of use, appears to be significantly lower for business services than for other services. In the Notice, we cited two studies finding that AT&T's market share of business services had fallen to approximately fifty percent. AT&T corroborates these studies with its own market share data. These data also indicate that AT&T's market share -- in revenues and in minutes -- of business services outside of Baskets 1 and 2 is in the range of about fifty percent.[89] In addition, AT&T provides data indicating that its share of lower volume Basket 3 service revenues approximates 55 percent. No one disputes these data or "presents inconsistent evidence."[90]

51. Several parties argue that AT&T's overall market

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[86] CompTel's arguments that the study ignores the merger of MCI and Telecom*USA and erroneously treats NTN as if it were a single company are not persuasive, given that the purpose of the study is to measure the combined capacity of AT&T's competitors, not the capacity of a particular competitor. In addition, CompTel's claims about the capacity of the NTN companies are inconsistent with data filed by NTN with the Common Carrier Bureau in 1989 showing that only about two thirds of NTN's fiber is lit. *See* Fiber Deployment Update, End of Year 1990, Industry Analysis Division, Common Carrier Bureau, March 1991, Table 3. Likewise, while Sprint claims that it does not have dark fiber throughout its network, data provided by Sprint indicate that only 54 percent of Sprint's fiber is lit. *Id.* Moreover, Sprint assertions that switch upgrades would take 7-10 years and that switches with a capacity of 80,000-100,000 trunks will not be available in the near future are belied by the recent announcement by MCI that it will upgrade 50-60 switches over a two-year period (25 percent in 1991), and that these switches will have a capacity of 80,000-100,000 trunks per switch. Network World, February 18, 1991, at 2. *See also* Communications Week, July 2, 1990, at 6.

[87] In fact, the unit costs assumed in Sprint's study for two of the principal cost categories -- switching and transmission -- are virtually identical to those assumed in the Bell Labs study.

[88] The one Basket 3 tariff filing that was not below the upper rate band was an analog private line filing at the upper rate band. AT&T Transmittal # 2939, filed March 1, 1991. As discussed below, we do not further streamline the regulation of AT&T's analog private line services.

[89] AT&T submits several studies -- some including Basket 1 business services, some relating specifically to switched business services, some including both switched services and private line services. In addition, AT&T provides separate market share data for private line services and Basket 3 international services. While the exact market share figures in these studies vary slightly, depending upon precisely which services are included in the study and how market share is measured in them (revenues or minutes), these studies consistently point to a market share of about fifty percent for the services at issue in this proceeding -- business services outside of Baskets 1 and 2.

[90] Although Sprint questions the probative value of the studies cited in the Notice, no one disputes AT&T's market share or provides convincing contradictory data. MCI, however, citing the lack of 800 number portability, in particular, claims that

share is inconsistent with a competitive market. [91] We are unpersuaded by these arguments for two reasons. First, to the extent that market share is relevant to an assessment of business services competition, AT&T's business services market share is more relevant than its overall market share. As noted, AT&T's market share in business services appears to be about fifty percent, a level that is not incompatible with a highly competitive market. [92] Second, market share alone is not necessarily a reliable measure of competition, particularly in markets with high supply and demand elasticities.

iv. IXC Cost Structures

52. Some parties, citing a study commissioned by CompTel, argue that AT&T enjoys switched access cost advantages over other IXCs -- particularly, smaller or "third tier" IXCs -- that make it difficult for these carriers to compete effectively with AT&T. They argue that this alleged access cost advantage will increase significantly if the Commission does not require LECs to continue "equal charge per unit of traffic" pricing of transport services when that MFJ requirement expires. As discussed below, each carrier brings distinct advantages and disadvantages to the marketplace. These advantages and disadvantages affect access costs as well as other costs of providing service. The evidence in the record does not show that AT&T does, in fact, enjoy significant access cost or overall cost advantages over its competitors.

53. The CompTel study that is the basis of claims that AT&T maintains a switched access cost advantage over its competitors did not actually compare the switched access cost structures of AT&T and its competitors. The study compared, instead, the transport cost structures of AT&T and a hypothetical fourth IXC. This comparison may yield misleading results for two reasons. First, CompTel's study addresses only transport costs. While transport costs represent about twenty percent of an IXC's total costs (and forty percent of its switched access costs), CompTel's study does not consider other types of access and nonaccess costs, including those disproportionately borne by AT&T. Thus, as AT&T notes, CompTel's study does not acknowledge that: (1) AT&T pays a relatively higher share of the High Cost Fund and Lifeline payments since the National Exchange Carrier Association assesses these costs based on an IXC's share of presubscribed lines, not minutes; [93] (2) AT&T pays a relatively higher share of Equal Access Network Recovery costs since some LECs recover these costs on a Feature Group D or presubscribed line basis; and (3) some of AT&T's competitors continue to use Feature Group B for terminating access even where equal access is available, so as to take advantage of the discount available for that type of access. CompTel also does not address the costs associated with AT&T's additional POPs.

54. Second, the hypothetical fourth IXC assumed by CompTel is not similar to existing small IXCs. CompTel's hypothetical IXC was assumed to originate traffic in all LATAs currently served by a third-tier IXC. In reality, however, small IXCs do not typically originate traffic throughout the country. [94] Rather, they tend to concentrate their facilities in areas where transport costs are lower. Thus, CompTel's methodology may tend to overstate third-tier IXC transport costs.

55. AT&T, in contrast, serves the entire country, including higher-cost rural areas. Thus, while AT&T may pay lower transport charges than a competitor in a particular LATA, that does not mean that its overall transport cost structure is lower than those of its competitors.

56. The evidence before us also fails to demonstrate that AT&T maintains a significant special access cost advantage. CompTel's claim that AT&T enjoys a significant special access advantage is based on a study that assumes that the number of special access lines served by each end office is proportional to the number of switched common lines served by that office. Because special access lines are generally used for large business applications, however,

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AT&T's share of the very largest," national account" business customers exceeds 80 percent. MCI Comments at 19. MCI claims that AT&T maintains an advantage with respect to these customers because of its unique ability to offer them one-stop shopping. MCI Comments at 48-49. Similarly, Wiltel submits a chart that appeared in the Wall Street Journal in October 1990 that purports to show that AT&T's "share of large business accounts" with annual telecommunications bills of at least $1 million annually is 87 percent. *Ex parte* letter from Richard L. Fruchterman, III, Williams Telecommunications Group, to Donna Searcy, Secretary, FCC, May 1, 1991. Neither MCI nor Wiltel (nor the underlying Wall Street Journal story), however, identifies what these data purport to measure --*i.e.*, whether it is AT&T's share of revenues, minutes, the number of customers for which it is the primary transmission service provider, or something else altogether. Moreover, other surveys indicate that the "high-end" segment of the business services marketplace is substantially competitive and that AT&T's market share in this segment is consistent with its overall market share for business services. For example, in the Wall Street Journal 1990 Telecommunications Survey of ICA members (93 percent of which had annual telecommunications expenditures of more than $1 million), 63 percent said that MCI was a major supplier of domestic transmission services for their firm, while 43 percent identified Sprint as a major supplier, and 22 percent identified Williams. *See* para. 22, *supra*. *See also, e.g.*, note 80, *supra*, and 4 FCC Rcd at 2634, para. 64 (citing survey finding that AT&T was primary vendor for 52 percent of surveyed businesses with annual communications budgets averaging just under $2.5 million). Finally, as discussed below, until 800 numbers are portable, we are prohibiting AT&T from including 800 or inbound service in its contracts and new Tariff 12 options. Thus, to the extent AT&T has had an advantage by virtue of the lack of number portability, this advantage will be reduced.

[91] Some of these parties fault the Notice for focusing on AT&T's market share decline over the past seven years. These parties claim that AT&T has managed its own market share losses and that these losses are therefore irrelevant to an assessment of AT&T's market position. While we believe that a protracted decline in market share tends to indicate a competitive market, we agree that market share trends can derive from a variety of factors and are not dispositive themselves of whether market power exists.

[92] *See* DOJ Reply at 27 and cases cited therein. CompTel argues that a fifty percent market share is sufficient to evoke the so-called "dominant firm model." *See* CompTel Comments, App. C at 9-10. According to CompTel, for this model to apply," the leading firm must be's ufficiently' dominant in market share terms to be able profitably to reduce or limit its expansion of output in order to elevate price." *Id.* Given the supply capacity of AT&T's competitors and the demand-elasticity of business customers, we do not think that this model is aptly applied to the business services segment of the interstate, interexchange marketplace.

[93] Since AT&T's share of presubscribed lines is higher than its share of switched minutes, AT&T, in effect, pays a higher per-minute share of these costs.

[94] *See* Gillan study at 6.

this assumption is problematic. Thus, for example, end offices serving large numbers of residential and small business customers would likely provide little, if any, special access, while offices that primarily serve large businesses are likely to provide disproportionately large amounts of special access. This is significant because these latter offices would generally tend to be located in lowaccess cost, urban areas. Therefore, CompTel's study likely overstates any special access cost differential between AT&T and its competitors. [95] Indeed, AT&T submits its own study of special access that finds that any AT&T special access cost advantage is limited, for the most part, to a small segment of special access users. [96]

57. In addition, CompTel's study of switched and special access costs does not consider non-access-related costs. By virtue of its historic role in the market, AT&T may well face higher costs in areas such as labor (due to the unionization of its work force), pension payments (due to its large base of retired workers), and maintenance expense (due to the age of its facilities). These are examples of potentially significant factors impacting AT&T's overall cost structure. Thus, even if AT&T pays relatively lower transport rates, as CompTel alleges, it is not clear that AT&T's overall cost structure is lower. We note that a number of AT&T's competitors enjoyed operating margins similar to or better than AT&T's during the years 1989 and 1990. [97] This would seem to indicate that at least some of these IXCs do not face a higher cost structure than AT&T. [98]

58. CompTel also contends that its access cost study disproves claims that AT&T's competitors could, immediately or in the short-term, economically serve substantial numbers of new customers. CompTel, however, assumes that AT&T's competitors would absorb new traffic by moving into new geographic areas (using existing third-tier IXC POPs), rather than by taking on new customers in markets they already serve or in other low-cost markets. This is not necessarily the case. Nevertheless, we, transport structure made it more difficult for small IXCs to expand into certain new geographic areas. We have therefore decided, in a companion Order and Further Notice of Proposed Rulemaking adopted today, to examine further the distance sensitivity of LEC transport costs and rates. [99] In this examination, we will give careful consideration to the degree of distance sensitivity of these costs and rates and the impact, if any, this distance-sensitivity has on the competitive position of smaller IXCs.

59. CompTel and others not only claim that AT&T has access cost advantages now, but also assert that implementation of the current Part 69 transport rules in lieu of equal charge per unit of traffic pricing would produce a large shift in the relative access costs of AT&T and most of AT&T's competitors, and that such a shift in access costs would significantly enhance AT&T market power. In the Transport proceeding, we require LECs to maintain the current transport rate structure pending further study of transport pricing. Therefore, the expiration of the MFJ requirement will not have any immediate impact upon the competitiveness of interstate interexchange services. Although future Commission decisions could alter relative access costs, we do not intend to adopt any abrupt change that is likely to have a significant impact on competition. Moreover, in light of our decision to address in other proceedings CompTel's concern that LEC access prices may be excessively distance sensitive, a future Commission determination could work to its members' benefit. Therefore, we conclude that the possibility of future changes in transport pricing does not warrant a reevaluation of our findings with respect to competition in the long-distance marketplace.

v. AT&T's Size and Resources

60. Some parties argue that AT&T enjoys market power by virtue of its size and superior resources, financial strength, and technical capabilities. Any such advantages that AT&T may have, however, do not necessarily confer market power. [100] The issue is not whether AT&T has advantages, but, if so, why, and whether any such advantages are so great as to preclude the effective functioning

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[95] CompTel also acknowledges that while the distribution of access lines should provide a reasonable approximation of traffic patterns for switched access, they may portray the distribution of special access "less precisely." Gillan Study at 9.

[96] *See* letter from Joel E. Lubin, Regulatory Vice President, Government Affairs, AT&T, to Donna Searcy, Secretary, FCC, July 11, 1991. This study shows that over 90 percent of AT&T's POPs are located within five miles of a competitor's POP and therefore tends to indicate that in most cases, AT&T's special access costs are not substantially different from those of at least one competitor. AT&T does not, however, indicate whether there still might be some access cost differential even between these closely situated POPs.

[97] For example, AT&T's operating margin (that is, its operating profit divided by its operating revenues) during 1989 and 1990 was 9.6 percent and 11.4 percent, respectively. *See* AT&T Communications, Annual Report Form M, 1989 and 1990, Schedule I-1. During this same period, MCI's operating margins were 15.2 percent and 8.1 percent; WilTel's were 19.9 percent and 24.2 percent; ATC's were 15.2 percent and 15.3 percent; LDDS' were 15.2 percent and 17.3 percent; and LiTel's were 9.4 percent and 10.2 percent. *See* MCI 1990 Annual Report at 20; Williams Companies 1990 Annual Report at 29; Advanced Telecommunications Corp. 1990 Annual Report at 16; LDDS Communications Annual Report at 10; and Litel Communications 1990 Form 10-K at F-6.

[98] We make no determination in this order as to whether SNFA contracts have discriminatorily favored AT&T, as MCI alleges. That issue has been raised, and will be addressed, in another proceeding. *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, 4 FCC Rcd 687 (1989). For purposes of this proceeding, what is most relevant is that AT&T has represented that it will no longer use any SNFA contracts for switching or transmission facilities (which are the ones that are the focus of MCI's allegations) after these contracts expire this year. *See id.*, MCI Opposition to Supplemental Direct Cases, filed November 13, 1989. Thus, even if AT&T previously benefitted from SNFAs, any such advantages will be soon eliminated.

[99] MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Order and Further Notice of Proposed Rulemaking, FCC 91-250 (released August 30, 1991) ("Transport proceeding"). We will address the distance sensitivity of switched access in the Transport proceeding. *Id.* at para. 20. We will address the distance sensitivity of special access in the Expanded Interconnection proceeding. *Id.* at note 41. *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141.

[100] AT&T may, in certain respects, be disadvantaged by its size. For example, it may be more difficult for AT&T to address the individualized needs of some customers or to respond quickly to marketplace changes.

of a competitive market. An incumbent firm in virtually any market will have certain advantages -- including, perhaps, resource advantages, scale economies, established relationships with suppliers, ready access to capital, etc. Such advantages do not, however, mean that these markets are not competitive, nor do they mean that it is appropriate for government regulators to deny the incumbent the efficiencies its size confers in order to make it easier for others to compete. Indeed, the competitive process itself is largely about trying to develop one's own advantages, and all firms need not be equal in all respects for this process to work.

61. In short, while AT&T may have certain first-in advantages, no one has shown that these advantages preclude the effective functioning of the business services market. On the contrary, we believe -- and the record confirms -- that competition in business services is thriving, that AT&T's competitors are growing, and that consumers are benefitting from these occurrences.

vi. Competition in Rural Areas

62. Some parties allege that competition is less vigorous in rural areas than elsewhere. They concede that geographic rate averaging protects most ratepayers -- including residential customers -- from the exercise of market power but claim that Tariff 12 has undermined the effectiveness of geographic rate averaging. These arguments ignore two crucial points. First, the vast majority of business customers continue to take services under generic tariffs, which will continue to reflect geographic averaging. [101] Second, there is no evidence that Tariff 12 has undermined geographic rate averaging. On the contrary, many of AT&T's Tariff 12 customers are located in whole or in part in rural areas. [102]

vii. Private Line services

63. We conclude that the private line marketplace is, in general, substantially competitive, except in the case of analog private lines. Private line services are used primarily by large businesses that tend to be highly demand elastic and that are the focal point of intense competition in the marketplace. In addition, the supply capacity of AT&T's competitors can be used to provide private line services as well as switched services. Thus, the supply and demand elasticities that, we conclude, prevail in the business services marketplace are also generally characteristic of the private line services marketplace. We note, further, that AT&T's prices for "Other private line" services in Basket 3 (which includes most of AT&T's digital private line services) have remained consistently below the upper rate band since the implementation of price cap regulation of AT&T. Finally, with one exception, large users who argue that analog private line services are not subject to vigorous competition, do not single out other private line services for special treatment. [103] For these reasons, we find that digital private line services are subject to substantial competition.

64. IDCMA argues that AT&T has been migrating customers to digital (and virtual) private line services and is thereby transferring its market power from analog to digital services. [104] IDCMA does not, however, explain how any market power that AT&T may have in analog private line services can be transferred to the digital arena. While AT&T's competitors may not compete as vigorously in the shrinking analog private line marketplace, there is no reason why they would not aggressively pursue any customer that switches from analog to digital service. Indeed, contrary to IDCMA's arguments, the migration of customers from analog to digital services would, if anything, increase overall private line services competition.

64. IDCMA also argues that AT&T maintained an 88 percent market share in digital private line services in 1989, and that this market share is inconsistent with a competitive market. [105] This market share data, however, is contradicted by more recent data, including AT&T's market share studies, as well as WilTel and CompTel data reporting AT&T's private line market share to be 62.3 percent and 74 percent, respectively. [106]

66. A Sprint, MCI, and TCA claim that AT&T enjoys certain advantages in the provision of private line services by virtue of its incumbent status and scale economies. As stated earlier, however, the issue is not whether AT&T has particular advantages, but whether it has advantages that preclude effective competition. There has been no such showing here. On the contrary, large users -- the predominant users of private line services -- view them to be substantially competitive. Nor has any party shown that any AT&T advantage in private line services is based on artificial barriers to competition or economically inefficient LEC special access pricing structures. These arguments are, therefore, not compelling.

67. While we have concluded that most private line services are substantially competitive, analog private line services may be less subject to competitive pressures than other business services, including other private line services. Although customers continue to make use of analog private line services, the analog private line market is shrinking as customers migrate to more efficient, high-quality, multiuse digital services. Indeed, we recently granted AT&T's request to scrap billions of dollars of

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[101] We note, in this regard, that AT&T's 1990 Basket 3 revenues greatly exceeded its Tariff 12 revenues for the year. *Ex parte* letter from Joel E. Lubin, Regulatory Vice President, Government Affairs, AT&T, to Donna Searcy, June 14, 1991.

[102] Thus, examples of locations receiving Tariff 12 service include Poplar Bluff, Missouri; Clanton, Alabama; Gran Prairie, Texas; Romeoville, Illinois; Junction City, Kansas; and Bath, Maine. These are just a small sampling of non-urban areas currently served by Tariff 12 arrangements. *Ex parte* letter from Joel Lubin, Regulatory Vice President, Government Affairs, AT&T, to Donna Searcy, Secretary, FCC, June 14, 1991.

[103] Ad Hoc Comments at 9-10; ICA Comments at 9-10; Broadcast Coalition Comments at 7-10.

[104] *Ex parte* letter from Herbert E. Marks and David Alan Nall, Attorneys for IDCMA, to Gary Phillips, Attorney, Policy and Program Planning Division, FCC, May 3, 1991.

[105] IDCMA Comments, Appendix A, at A-25.

[106] The WilTel data was presented by WilTel at a May 7, 1991, financial analyst seminar. *See ex parte* letter from Joel Lubin, Regulatory Vice President, Government Affairs, AT&T, to Donna Searcy, Secretary, FCC, June 14, 1991. To the extent that AT&T's overall private line market share approximates 60 percent or even 70 percent, as alleged by CompTel, and given AT&T's much higher market share for the analog private line segment, its share of digital private line services could not be 88 percent.

analog plant that is being replaced by digital facilities.[107] Because analog private line services are being supplanted by digital technology, IXCs have less of an incentive to compete vigorously in this area: it is simply not cost-effective to divert marketing and engineering resources to a service that customers are abandoning. We therefore believe that AT&T's analog private line services are less subject to competitive constraints than other business services.

(2)Further Streamlining of Business Services

(a)Policy Considerations

(i)The Notice

68. The Notice tentatively concluded that current tariff filing requirements for AT&T's business services appear to impose undue costs without countervailing benefits. In particular, the Notice suggested that current notice periods may unnecessarily delay the availability of pro-consumer tariff filings, deter AT&T from making such filings, and encourage AT&T's competitors to take a reactive, rather than proactive, posture towards competition in the marketplace. In light of these considerations, the Notice proposed maximum streamlined regulation for AT&T's Basket 3 services and for AT&T services not subject to price cap regulation. Under maximum streamlining, AT&T would be permitted to file tariffs on one day notice and without cost support. Price cap ceilings, bands, and floors would no longer apply.

(ii) Positions of the Parties

69. AT&T, DOJ, NTIA, and large users support the Notice's tentative conclusions. These parties complain that a user doing business with AT&T must endure lengthy delays before it can realize the benefits of its bargain. These delays, they state, cost consumers millions of dollars and inhibit the effective functioning of the competitive process.[108] AT&T also complains of asymmetry in tariff filing requirements, asserting that the delays and uncertainties attending AT&T tariff filings may drive customers to its competitors.[109]

70. Florida and Illinois comment that they have substantially deregulated most of AT&T's services and that the results to date have been positive. [110] Florida states that since it began forbearing from regulating AT&T's services in 1989, AT&T's rates, including its MTS rates, generally decreased, and its market share has declined by more than eight percent.[111] Illinois reports that since it deregulated most of AT&T's services with respect to rates and earnings, AT&T's rates have decreased, and the number of IXCs in Illinois has more than doubled. Illinois states, further, that there has been no evidence of predatory pricing by AT&T.[112] Hawaii, on the other hand, opposes maximum streamlining for AT&T, saying that the Commission's analysis of the market is incomplete.[113] Arkansas, the District of Columbia, and Michigan comment that no significant changes should be made in our regulation of AT&T until the Commission completes its four-year price cap review. [114]

71. IXCs other than AT&T, as well as TCA, CFA, and SBA, oppose maximum streamlining. They assert that the Notice exaggerates the burdens of current tariff requirements on AT&T. They state that AT&T is currently filing little or no information that it does not develop anyway for its own business purposes and that only a small percentage of AT&T business service tariffs other than Tariff 12 offerings are filed on 45 days notice. [115] They argue that eliminating price cap ceilings, bands, and floors would jettison any standard for assessing AT&T's rate revisions. [116] In addition, noting that several of AT&T's tariff filings have been rejected over the past year, these parties dispute claims that advance review of AT&T's tariffs is no64longer necessary. [117] They urge us not to rely on the complaint process as the sole remedy for unlawful AT&T tariff filings, claiming that a heavy backlog of complaints makes the complaint process ineffective.

(iii) Discussion

72. We now find that further streamlining of our regulation of most of AT&T's Basket 3 services and most of its services outside of price cap regulation would be in the public interest. Specifically, we find that the public interest would be served by further streamlining of: (1) all of AT&T's Basket 3 services, other than analog private line services; and (2) all services outside of price cap regulation, including Tariff 12 services, but excepting special construction services relating to nonstreamlined services and promotional offerings for nonstreamlined services. [118] We do not, however, adopt maximum streamlined regulation, as proposed in the Notice. In addition, although we conclude that the public interest would be served by further streamlining of our regulation of Tariff 12 services, we conclude that we should make the effectiveness of such streamlining contingent upon a favorable finding

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[107] *See* Modification of the Commission's Depreciation Prescription Practices as Applied to AT&T and the Prescription of Revised AT&T Depreciation Rates, 4 FCC Rcd 8567 (1989).

[108] Ad Hoc Comments at 13; AT&T Comments at 28.

[109] *See* AT&T Comments at 27-29.

[110] Iowa also states that it completely deregulated all of AT&T's intrastate long-distance services, with the exception of operator-assisted MTS and directory assistance services. Iowa Reply at 1. In addition, three states filed comments stating that they have implemented some form of streamlining of their regulation of AT&T. *See* California Comments; Ohio Reply; Tennessee Reply.

[111] Florida Comments, Attachment at 8-11.

[112] Illinois Reply at 9.

[113] Hawaii Comments at 10-14.

[114] Arkansas Comments at 4; Michigan Staff Comments at 5; DC PSC Comments at 7-8. Although Arkansas and Michigan opposed the proposals in the notice, each stated that the Commission could, as an interim measure, shorten the notice periods for some of AT&T's tariff filings. Arkansas Comments at 8; Michigan Staff Comments at 13.

[115] *See, e.g.,* CompTel Comments at 122 (excluding Tariff 12 filings, from May 1989 to May 1990, twelve percent of AT&T's tariffs for business services were filed on 45 days or more notice).

[116] CompTel Comments at 115.

[117] CompTel suggests that even more of AT&T's tariffs would have been unlawful were it not for the deterrent effect of advance tariff review.

[118] We do not change the regulation of AT&T's international private line and record carrier service; AT&T's tariffs for those services may already be filed on fourteen days notice without cost support. *See* International Competitive Carrier Policies, 102 FCC 2d 812 (1985).

with respect to the lawfulness of Tariff 12s in the remand investigation ordered by the United States Court of Appeals for the District of Columbia Circuit. [119]

73. Given the competitiveness of the business services market, advance scrutiny of most AT&T business service tariffs no longer appears necessary to protect the public interest. Unlawful tariffs should be rare, and in those few instances in which they may occur, remedial action can be taken after the tariffs become effective. Nevertheless, rather than forgo all advance review of these streamlined tariffs, we believe that, at least initially under this new regulatory regime, limited advance review of AT&T's streamlined tariffs is appropriate. [120]

74. We will allow AT&T to file its business service tariffs subject to further streamlining on fourteen days notice. In light of the competitiveness of business services, such tariffs shall be presumed lawful for purposes of advance tariff review. [121] Accordingly, AT&T need not file cost support with these tariffs, and price cap ceilings, bands, and rate floors will no longer apply. Interested parties may file petitions against these tariffs pursuant to the timetables prescribed in our existing rules. [122] This advance review will provide us with an opportunity to identify and suspend and/or reject tariffs where necessary before they go into effect. We will reject any tariffs that we find on their face conflict with a statute or an agency regulation or order. In addition, we retain authority to institute at any time on our own motion investigations of AT&T tariffs after they become effective and to declare tariffs unlawful, if necessary. We will also adjudicate in the complaint process claims of unlawful actions by AT&T. We believe that these modifications to our maximum streamlining proposal will serve the public well by reducing opportunities for gamesmanship by parties participating in the regulatory process and minimizing unnecessarily intrusive regulation, while at the same time preserving for the present both advance and subsequent scrutiny of AT&T's business services tariffs. [123]

75. Some parties note that the Commission has suspended or rejected several of AT&T's tariff filings during the past year and argue that this is proof of the need for advance review of AT&T's tariffs. As noted, we will continue to conduct limited advance review of AT&T's business services tariffs. We note, however, that most of the rejected or suspended tariffs either related to services for which we do not adopt further streamlined regulation or raised issues about which there was considerable regulatory uncertainty at the time and which we are now resolving. [124] Therefore, the fact that previous AT&T tariffs have been suspended or rejected does not indicate that AT&T is likely to file unlawful business services tariffs in the future. Moreover, further streamlining would not preclude the Commission from suspending or rejecting any unlawful tariff before it takes effect or investigating and finding unlawful any tariff after it is filed. [125]

76. CompTel argues that Basket 3 price cap ceiling and rate bands remain necessary to gauge the lawfulness of AT&T's rate revisions. Given the competitiveness of the business services marketplace, we disagree. As noted above, not one of AT&T's price cap filings for services that we now find substantially competitive has been at or above the applicable upper rate band. Moreover, only five

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[119] *See* MCI Telecommunications Corp. v. FCC,917 F. 2d 30 (D.C. Cir. 1990). *See also* AT&T Communications, Revisions to Tariff FCC No. 12, Order, 6 FCC Rcd 740 (1991). Puruant to 5 U.S.C. § 553(b)(B), we delegate to the Chief of the Common Carrier Bureau the ministerial task of conforming our rules, without the need for further notice or comment, to reflect our decision today in the event of such finding of lawfulness by the Commision in the Tariff 12 remand proceeding.

[120] We decide to retain limited advance review of tariffs as a matter of policy. We do not reach the question of whether advance review of dominant carrier tariffs is required as a matter of law under the Communications Act.

[121] This presumption of lawfulness for purposes of advance review does not change the substantive standards to be used in evaluating a tariff in a complaint proceeding or tariff investigation.

[122] Under our rules, petitions relating to tariffs filed on fourteen days notice must be filed within seven days after the tariff is filed. *See* 47 C.F.R. § 1.773(a)(2)(i).

[123] Telesphere, NYCOM, and CompTel argue that we should not apply streamlined regulation to AT&T's 900 services. Citing the lack of 900 number portability and the unavailability to AT&T's competitors of direct access to non-equal access end offices, they argue that the 900 services market is not competitive. CompTel Comments at 66-67; Telesphere Comments at 36-40; NYCOM Comments at 25-26. We find these arguments unconvincing. Competition in 900 services was introduced in 1988. Since that time the 900 services market has grown exponentially. Indeed, the number of programs carried on interstate 900 services has grown from 233 in 1988 to over 14,000 at the beginning of 1991. *See* Comments of the Information Industry Association, CC Docket No. 91-65, Policies and Rules Concerning Interstate 900 Telecommunications Services, April 24, 1991 at 3-4. Similarly, 900 services revenues have increased by some estimates from $235 million in 1989 to almost $1 billion in 1990. *Id.* Others have projected that 900 services revenues will approach $2 billion by 1992. *See* Strategic Telemedia, Jan. 1991; *ex parte* letter from Danny Adams, Wiley, Rein, & Fielding, Counsel for National Association for Information Services, to Donna Searcy, Secretary FCC, July 17, 1991, CC Docket No. 91-65. Because virtually all of the growth in 900 services occurred after competition for these services was introduced, AT&T does not have the advantage of a large embedded base of 900 service subscribers who would have to change their number in order to switch to another carrier. 900 services are different from 800 services in this respect. Furthermore, 900 numbers are frequently used for one-time applications, further reducing the likelihood that there is a significant base of "captive customers". In light of these factors, it is unlikely the lack of 900 number portability confers an appreciable advantage on AT&T. Finally, any advantage that AT&T may have in non-equal access end offices does not confer market power given that 93 percent of the nation's access lines have now been converted to equal access and that AT&T's competitors are free to resell AT&T transmission services for traffic originating from those remaining end offices.

[124] Of the twelve AT&T tariffs that the Commission has rejected since 1989, seven related directly or indirectly to AT&T's efforts to make individually negotiated offerings in response to similar offerings from its competitors, and the remaining five involved, at least in part, Basket 1 and 2 services, which we are not here streamlining.

[125] Some parties assert that the complaint process, by itself, is not adequate to deal effectively with unlawful tariffs. Under further streamlining, however, we will continue to review AT&T's business services tariffs before they take effect, and we also retain full authority to investigate on our own and find unlawful any tariff that does not comply with the Act. *See* 47 U.S.C. § 205. Moreover, we believe that competition in the provision of business services substantially reduces the likelihood of unlawful tariffs for these services.

of 638 filings have been below the lower rate band, and after heightened review, all five were allowed to go into effect. Thus, price caps does not appear to be necessary as a constraint on AT&T's pricing of the most competitively provided business services. [126]

77. As discussed above, we will continue to review all of AT&T's tariff filings before they go into effect and we retain authority to investigate and/or find unlawful these tariffs after they go into effect. These measures, coupled with the significant and growing competition for business services, should adequately protect consumers from anticompetitive pricing of business services.

78. We find that further streamlining is in the public interest, not only because current tariff filing requirements for most business services are more extensive than necessary, but also because these requirements impose both direct and indirect costs on users. They impose direct costs by delaying the availability of new services and price reductions. Although some of AT&T's competitors maintain that the Commission overstates the significance of these delays, business customers -- the parties affected by them -- say otherwise. Ad Hoc, for example, states that "the cost to individual customers who must wait two, three or four months after the tariff filing date to realize the benefits of their bargains can be in the millions of dollars."[127] Similarly, the Bank Coalition asserts that delays associated with Tariff 12 filings "impose a heavy regulatory price on customers that choose AT&T as their carrier." [128] In addition, the NERA study illustrates in detail the frustration of business customers with the delays associated with current tariffing requirements.[129]

79. Many users also complain of the regulatory uncertainty that current tariffing rules inject into the marketplace. Noting that AT&T tariffs introducing new services and lower prices are routinely challenged by AT&T's competitors, these users state that the uncertainty that attends these challenges represents a significant cost of doing business with AT&T. [130]

80. Current rules also impose indirect costs on consumers by distorting the competitive process. First, they deny AT&T the full pricing flexibility needed to react to market conditions and customer demands and thereby diminish its ability to compete as a full-fledged competitor. Second, by creating regulatory delays and uncertainty, they reduce the value of AT&T's service offerings. Third, by affording AT&T's competitors as much as ninety days advance notice (more if the tariff is suspended) of AT&T price and service changes, they foster a reactive market, rather than a proactive one, and reduce incentives for AT&T's competitors to "stay on their competitive toes." And fourth, by negating, in whole or in part, AT&T's ability to take advantage, as its competitors can, of being a "first-mover" in the market, they lessen AT&T's incentive to initiate pro-consumer price and service changes. [131] We believe that permitting business service tariffs to go into effect on fourteen-days notice will result in a substantially more dynamic and proactive market without presenting an undue risk of undetected and unremedied anticompetitive action. [132]

81. We find that further streamlining of our regulation of AT&T's analog private line services would not be in the public interest. As noted above, analog private line services are of diminishing importance in the marketplace and these services are consequently less subject to competition than other business services. Under the circumstances, we are concerned that elimination of the price cap restraints for analog private line services could lead to higher prices for these services. While many customers would likely respond to higher prices by switching to digital services, adequate substitutes using digital technology are not currently available to all users of analog private line services. We therefore retain price cap regulation for AT&T's analog private line services.

82. Analog private line services will remain in Basket 3 under price cap regulation. Because these services will be the only services remaining in the Business Services Basket, we make the following adjustments to the price cap

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[126] Sprint and CTI also argue that we have not adequately justified the abandonment of price cap regulation for Basket 3 services just one year after price cap regulation was adopted. CTI Comments at 3-8, *citing*, California v. FCC, 905 F. 2d 1217 (9th Cir. 1990); Sprint Comments at 124. The Commission adopted price caps, however, as an alternative to rate-of-return regulation of dominant carriers, not as a response to the growth of competition in the long-distance market. Indeed, the Commission specifically rejected, as beyond the scope of the price cap proceeding, arguments that it should consider there additional regulatory reforms based on the competitiveness of the long-distance marketplace. 4 FCC Rcd at 2943, para. 133. In contrast, the reform measures that we adopt here are specifically premised on our analysis of competition in the marketplace. Moreover, price caps was an important precursor to the changes we now enact because they provide an extra measure of protection against cross-subsidization. In particular, the continuing price cap ceilings and rate bands for Basket 1 and 2 services will help to ensure that the rates for those services will remain just and reasonable regardless of the pricing of other services.

[127] Ad Hoc Comments at 13, n. 10.

[128] Bank Coalition Comments at 7. *See also* API Reply at 10; and *ex parte* letter from Vincent A. Russo, Chairman, Regulatory Committee, SDN Users Association, Inc., to James Schlichting, Chief, Policy and Program Planning Division, FCC, April 29, 1991.

[129] *See* NERA study at 54 (quoting Telecommunications Manager for Dow Chemical): "The regulatory process creates hurdles that invariably translate into delays and we can't afford delays in our decisionmaking"; and NERA study at 100 (quoting Executive Vice President, Operations and Facilities, PaineWebber, Inc.): "Our network is critical to the mission of this firm. We had to have better response time to our brokers. We had to make better progress on our automation efforts. Not only did the regulatory delay cost us nearly a half million dollars in savings, it stalled our getting started."

[130] *See* Bank Coalition Comments at 9; Ad Hoc Comments at 13. *See also* letter from Paul Pavloff, Senior Director for Information Resources, Georgia Pacific Corp., to Alfred Sikes, Chairman, FCC, August 31, 1989: "In the fast-moving marketplace, uncertainties associated with tariff filings and the anticipation of regulatory delays have become disincentives for us to rely on AT&T as our primary vendor."

[131] While Sprint claims that it generally takes longer than 14 or 45 days to implement a market response to an AT&T initiative, the fact that AT&T's competitors have this lead time with which to work is itself a factor, even if the market response cannot be implemented before AT&T's tariff goes into effect.

[132] Alascom and several BOCs comment that they are subject to vigorous competition in their respective markets. They claim that, as a result of this competition, the Commission should modify its regulation of their services as well. Alascom Comments at 11; PacTel Comments at 9; SWBT Comments at 5; Bell Atlantic Comments at 5; NYNEX Comments at 5-12; USTA Comments at 9; GTE Comments at 1-6; Contel Comments at 3-6. These arguments are beyond the scope of this proceeding.

rules for Basket 3 services. First, we eliminate service bands for Basket 3, since with the elimination of most business services from this Basket, service bands will no longer be necessary to protect consumers from cross-subsidization. Second, we recalibrate the price cap index (PCI) and actual price index (API) for Basket 3 to reflect the elimination of all services other than analog private line services from this Basket. The PCI and API for Basket 3 are assigned a value equal to 100, corresponding to the costs and rates in effect on August 1, 1991.[133]

(b) Lawfulness of Further Streamlining

(i) The Notice

83. The Notice tentatively concluded that we have ample legal authority to implement maximum streamlined regulation. We noted that section 203(b)(2) of the Act grants us authority "for good cause shown" to "modify" the notice period for tariff filings "either in particular instances or by general order applicable to special circumstances of conditions." Citing *Southern Motor Carriers Rate Conference v. United States*, we tentatively concluded that the growth of competition in the interexchange marketplace constitutes "special circumstances or conditions" that permit us to authorize a one-day notice period for certain tariff filings.[134]

(ii) Positions of the Parties

84. A number of parties argue that a one-day notice period would violate sections 203-205 of the Act. They argue that the Act requires both advance and retrospective review of tariffs and that maximum streamlining would be unlawful insofar as it would effectively preclude advance tariff review. [135] These parties argue that our reliance on *Southern Motor Carriers* is misplaced and that, in any event, a subsequent Supreme Court case, *Maislin Industries v. Primary Steel, Inc.*, [136] supersedes the *Southern Motor Carriers* decision.

85. AT&T, NTIA, and several large users argue that maximum streamlined regulation would be lawful. [137] NTIA and API argue that we have ample legal authority to rely on competition as the primary check (and retrospective review including the complaint process as the secondary check) against unreasonable or unjustly discriminatory rates. [138] API states that this authority is enhanced by Section 4(i) of the Act. [139] AT&T contends that maximum streamlining is fully consistent with the substantive provisions of the Act. [140] Citing section 203(b)(2) [141] and *Southern Motor Carriers*, AT&T argues that we have broad discretion to determine how to enforce these provisions, including the discretion to eliminate advance review of carrier tariffs. [142]

(iii) Discussion

86. We conclude that further streamlining of our regulation of AT&T's business services, as outlined above, is authorized under section 203(b)(2) of the Act. Section 203(b)(2) permits us to change the notice requirements of the Act "by general order applicable to special circumstances or conditions." We believe -- and *Southern Motor Carriers* affirms -- that the growth of competition in the long-distance market, and the market for business services in particular, represents a permissible basis for modifying the Act's notice requirements and allowing certain tariffs to become effective on fourteen days notice. [143]

87. In *Southern Motor Carriers*, the court specifically recognized that a "changed competitive situation" could be a legitimate and lawful basis for changing notice requirements under the ICA., [144] Thus, the court upheld an Interstate Commerce Commission (ICC) order modifying the ICA's thirty-day notice requirement and allowing cer-

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[133] In the price cap reconsideration proceeding, we indicated that we would be reluctant to disaggregate service baskets further because of the effect disaggregation would have on the reliability of the productivity offset factor. We stated that the productivity offset used in the price cap formula is based on total company productivity performance and that application of the factor to each of several baskets raises concerns about its accuracy. Policy and Rules Concerning Rates for Dominant Carriers, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 665, 669 (1991). We realize that the removal of most services from Basket 3 could affect the accuracy of the productivity offset for that basket. We find, however, that, in light of the diminishing demand for analog private line services, the administrative costs of establishing a new productivity factor for analog private line services outweighs any benefits that a separate productivity factor would bring. Furthermore, we have no reason to believe that AT&T will not be able to meet the productivity goal embedded in the PCI. We also note that we will have an opportunity to review the accuracy of the productivity offset when we conduct our price cap review next year.

[134] In that case, the Eleventh Circuit sanctioned use of a one-day notice period for certain rate decreases under the Interstate Commerce Act (ICA). The ICA contains language similar to that in Section 203 of the Communications Act. *See* 773 F. 2d 1561 (11th Cir. 1985) (hereinafter "Southern Motor Carriers").

[135] *See, e.g.*, MCI Comments at 125; Sprint Comments at 124-125; Cable & Wireless Comments at 22; CTI Comments at 2-3; TCA Reply at 9; and ACTA Reply at 18.

[136] _____ U.S. _____,110 S. Ct. 2759 (1990) (hereinafter "Maislin").

[137] API Comments at 21-25; Ad Hoc Comments at 15; Banking Coalition Comments at 6-7; NTIA Reply at 14, n. 27; AT&T Reply at 65-69.

[138] NTIA Reply at 14, n. 27; API Comments at 23, *citing*, FPC v. Texaco, 417 U.S. 380,400-401 (1974).

[139] API Comments at 21-22. Section 4(i) of the Communications Act empowers the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).

[140] AT&T Reply at 65-66.

[141] Section 203(b)(2) gives us the authority, under certain circumstances, to modify the notice provision of section 203(b) of the Act.

[142] AT&T Reply at 68-69. *See also* NTIA Reply at 14, n. 27.

[143] The Act does not require AT&T to submit cost support with its tariffs. Rather, cost support requirements were established by Commission rule. We thus have authority to modify or eliminate these requirements. We find, in light of the demonstrated growth of competition for business services, that these requirements are no longer necessary.

[144] Thus, for example, the court stated: "[T]he ICC has recognized, as one standard for general reductions in the notice period, the need to react to general changes in competitive situations. Moreover, petitioners cite no authority to support their assertion that a generally prevailing competitive climate cannot justify steps to assure that everyone operating in that climate can compete to the maximum extent possible." 773 F. 2d at 1570. *See also* 773 F. 2d at 1569: ("Implicit in the ICC's decision is reliance upon the changed competitive situation to support its challenged action.")

tain rate changes to be filed on one day notice. We believe that similar considerations permit us to allow AT&T to file certain of its business service tariffs on fourteen days notice. As discussed above, the long-distance marketplace has grown increasingly competitive, and there is now substantial competition for the business services that we are streamlining. In light of these changed circumstances, we believe that a fourteen-day notice period for certain business service tariff filings will serve the public interest. In particular, it will increase competition for business services, minimize unnecessary tariff delays and uncertainty, and reduce regulatory asymmetry between AT&T and other IXCs in the most competitive market segment. [145]

88. Some parties claim that the Communications Act requires that the Commission review common carrier rates before the rates become effective and that, therefore, maximum streamlining would be unlawful. In light of our decision to adopt a fourteen-day notice period in lieu of maximum streamlining, we need not reach that issue.

89. We do not believe, as some parties argue, that the Supreme Court's decision in *Maislin* conflicts with *Southern Motor Carriers* or otherwise affects our authority to adopt further streamlining. In *Maislin*, the Court held that the rate filing requirement was "utterly central to the administration of the ICA." [146] *Maislin* did not involve notice requirements or the extent to which advance review of a tariff filed with a regulatory commission is necessary. Indeed, the Court expressly declined to rule on such issues. [147] Instead, the Court ruled that the carrier involved violated the statute by failing to file its rates. Under further streamlining, however, AT&T is still required to file its tariffs. We will still have an opportunity to review these tariffs before they go into effect and to investigate and, if necessary, find them unlawful after they go into effect. The changes that we are implementing are warranted by changed competitive conditions and in no way contravene the central purposes of the Act.

(3) Contract Carriage for Business Services

90. Noting the increased tendency of large business customers to use competitive bidding processes to meet their telecommunications needs and the significant number of off-tariff offerings apparently being made by AT&T's principal competitors, the Notice tentatively concluded that "we should and can provide AT&T with greater flexibility to respond to the current dynamics of the marketplace." [148] We offered two proposals to this end: (a) a contract rates proposal, pursuant to which AT&T would be able to offer certain services under contract, and (b) a private carriage proposal, pursuant to which AT&T would be able to offer a limited amount of service on a private carriage basis. [149]

91. We now adopt, with certain modifications, the contract rates proposal. [150] Specifically, we permit IXCs to offer services pursuant to individually negotiated contracts. AT&T may offer contract rates only for services subject to further streamlined regulation. In addition, at least fourteen days prior to the effective date of its contracts, AT&T must file with the Chief, Common Carrier Bureau, a tariff, based on the terms of the contract containing all information required under section 203 of the Act. All contracts must be made generally available to similarly situated customers under substantially similar circumstances so as to comply with the nondiscrimination provisions of the Act.

(a) Policy Considerations

i. The Notice

92. The Notice stated that permitting IXCs to offer users the option of obtaining services under contract would offer significant benefits without appreciable costs. We stated that contract carriage would enable users to purchase services that match their needs in specific ways, and could facilitate planning by both users and IXCs through greater availability of long-term commitments and price protection. We also suggested that contracts would enable carriers to realize economic efficiencies and users to share savings from those efficiencies. [151]

ii. Positions of the Parties

93. AT&T, NTIA, DOJ and many users (including the Bank Coalition, ICA, Ad Hoc, API, the Broadcast Coalition, and the SDN Users Group) support our initiative to provide AT&T greater freedom to offer contract rates. They argue, generally, that contract carriage will promote competition in the long-distance market and result in more and better choices for users.

94. Large users support contract carriage as a way of expanding the benefits of Tariff 12. They argue that competition among IXCs and non-carrier integrators for users pursuing custom designed services is intense and has resulted in both rate reductions and greater responsiveness

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[145] Sprint alleges that *Southern Motor Carriers* is inapplicable because the notice provisions of the Communications Act are different from those in the ICA. This argument ignores the legislative history of the Communications Act, which makes it clear that section 203 was not intended to have a different meaning from the correlative ICA provisions upon which it was based. *See* AT&T v. FCC,487 F. 2d 864 (2nd Cir. 1973), *citing* S. Rep. No. 781, 73rd Cong., 2d Sess. 4 (1934). *See also* legislative history of 1976 Amendments to the notice provisions of the Communications Act, which state: "[t]he Committee expects that the Commission will not require the full 90-day notice period in most cases, and that the maximum notice period will be required only where there is a compelling reason to do so. H. Rep. No. 941315, 94th Cong., 2d Sess. 3, *reprinted in*, 1976 U.S. Code Cong. & Admin. News 1926, 1927-28. This language is inconsistent with claims that the "special circumstances and conditions" test of section 203(b)(2) is intended to be especially strict. Others, citing 1980 amendments to the ICA that curtailed the ICC's ability to suspend rates falling within certain rate zones, claim that *Southern Motor Carriers* is inapt because that decision was based on Congress' stated intent to lessen regulation of motor carriers. There is no indication in *Southern Motor Carriers*, however, that these amendments were crucial to the court's decision. On the contrary, the court found independent authority for one-day notice under the old provisions of the ICA. *See* 773 F. 2d at 1567-1572.

[146] 110 S. Ct. at 2768-2772.

[147] 110 S. Ct. at 2770, n. 14.

[148] 5 FCC Rcd at 2642, para. 126.

[149] *See* 5 FCC Rcd at 2641-45.

[150] The record does not support the adoption of our private carriage proposal at this time.

[151] 5 FCC Rcd at 2642, para. 128.

to user needs. [152] They state that competition would be furthered and that users would benefit even more if we allowed all IXCs to compete more freely for customers seeking individually negotiated service arrangements, and if we eliminated some of the regulatory uncertainties that currently cloud AT&T's offerings in this area. [153]

95. ICA states that contract carriage would benefit not only large users, but others as well, by fostering more efficient use of common carrier network facilities and by enabling users to meet customized needs without relying on private networks. [154] The Broadcasters support contract carriage as a way of providing users with certainty that their contracts will not be superseded by later filed tariffs. [155]

96. Parties also comment that contract carriage will likely reduce the likelihood of "umbrella pricing" or tacit collusion in the marketplace. [156] DOJ and the Bank Coalition advocate keeping specific rate information confidential no matter what form of individually negotiated rate plan we adopt. They state that by preserving the confidentiality of rates, we would deprive carriers of the type of knowledge and confidence that facilitates price collusion or coordination. [157]

97. A principal focus of CompTel and its members is on predation. Noting that the Notice limited its discussion of predation to so-called "classic predation", these parties claim that this analysis is facile and out-of-step with the last ten years of economic scholarship. [158] Citing the so-called "new, new" theories of predation, they argue that there are numerous ways in which AT&T can damage its rivals and police the marketplace without actually pricing below cost. They state, for example, that AT&T can use selective price cuts to discipline new entrants in a market or aggressive price cutters. These discounts, they state, need not be below cost, since AT&T's competitors -- particularly when they are first entering a market -- have to price below AT&T in order to win business. In addition, they state, AT&T can use selective price cuts to earn a reputation for responding to new entry or aggressive price cutting by its competitors. Similarly, they state, it can set prices in such a way as to manipulate potential entrants' beliefs about the profitability of entry into particular markets or to affect their access to capital. [159]

98. Both AT&T and DOJ respond to the claims of AT&T's competitors regarding predation. AT&T claims that courts have refused to recognize above-cost pricing as predation and that its competitors really seek protection *from* competition, rather than (protection *of* competition. [160] DOJ states that predation is not likely to occur, except perhaps as an isolated phenomenon, and would, in any case, be rather obvious. DOJ states that prohibiting contract carriage altogether so as to minimize the risk of predation would be a far too costly form of insurance against such unlikely behavior. [161]

99. Opponents of the Commission's contract carriage proposal also argue that contract rates would increase price discrimination, harm resellers, and result in geographic rate deaveraging. Sprint, SBA, and CFA argue that allowing contract carriage would result in lower contract rates for the most demand-elastic customers, and higher rates for customers less likely to switch carriers. Without contracts, they argue, AT&T would be forced to lower its rates to all customers in order to compete for the most elastic customers. [162] CFA expresses particular concern about the fate of residential customers, claiming that AT&T's attempts to raise night and weekend residential rates and its failure to flow-through all access cost reductions demonstrate the vulnerability of residential customers to AT&T price increases, notwithstanding price caps. [163]

100. Other parties, such as CompTel, ACTA, and US Fibercom, express concern about the fate of resellers. They argue that AT&T, MCI, and Sprint have incentives to force resellers out of the market and that AT&T would not likely offer resellers attractive contract rates in a contract carriage environment. [164] US Fibercom cites the Commission's longstanding commitment to promoting resale and recognition of the role of resellers in promoting competition and reducing the ability of facilities-based carriers to engage in discrimination. [165]

101. Finally, some commenters argue that contract carriage would result in geographic deaveraging of long-distance rates. They argue that customers in rural areas would be forced to pay higher prices than customers in

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[152] *See, e.g.*, Ad Hoc Comments at 25-26; Bank Coalition Reply at 11.

[153] *See e.g.*, Ad Hoc Comments at 12-14; Bank Coalition Comments at 3-8; API Comments at 24-25; SDN Users Comments at paras. 1 and 7. *See also* DOJ Reply at 42-43; NTIA Reply at 17-19.

[154] ICA Comments at 13.

[155] The Broadcasters Comments at 7-10. We have previously stated that tariff revisions that alter material terms and conditions of a long-term contract may be unjust and unreasonable unless the carrier can show "substantial cause for change". RCA American Communications, Inc., 84 FCC 2d 353, 358 (1980) (Investigation Order); 86 FCC 2d 1197, 1201 (1981) (Rejection Order); 2 FCC Rcd 236 (1987) (Reconsideration Order) (RCA Americom Decisions). The Commission, however, cannot otherwise prevent carriers from abrogating carrier-customer contracts with inconsistent tariff filings. *See* American Broadcasting Companies, Inc. v. FCC, 643 F. 2d 818 (D.C. Cir. 1980).

[156] *See* DOJ Reply at 41, 44-46; NERA study at 69 (quoting Senior Director, Information Resources, Georgia-Pacific Corp.).

[157] DOJ Reply at 45; Bank Coalition Reply at 11.

[158] CompTel Comments at 88; Kwoka at 49; Robert J. Reynolds," Aspects of Dominant Firm Behavior", June 1990, CompTel Comments, vol. II, Appendix G, at 3-4 (hereinafter "Reynolds"). Classic predation involves pricing below some measure of incremental cost to drive competitors out of business or to deter entry. The Notice tentatively concluded that AT&T would be unlikely to engage in predatory behavior. 5 FCC Rcd at 2642.

[159] CompTel Comments at 92-101; Kwoka at 49-61; Reynolds at 8-29. *See also* Cable and Wireless Comments at 7-21; Sprint Reply at 30-32.

[160] AT&T Reply at 15-18.

[161] DOJ Reply at 46-47.

[162] Steven Salop, Steven R. Brenner and Gary Roberts," Market Power in Long-Distance Telephone Markets", Sprint Comments, Appendix 15, at 24-27 (hereinafter "Salop et al."). *See also* SBA Comments at 18-21.

[163] CFA Comments at 1-4.

[164] US Fibercom Comments at 11-25; CompTel Comments at 99; ACTA Comments at 14.

[165] According to US Fibercom, AT&T is already seeking to undermine the viability of switchless resellers. *See* US Fibercom Comments, Exhibit 13.

lower-cost urban areas. As noted, some of these parties complain that Tariff 12 has "already resulted in geographic rate deaveraging. [166]

iii. Discussion

102. We conclude that permitting AT&T to offer contract rates for services subject to further streamlining is in the public interest. In particular, we find that allowing AT&T greater freedom to enter into contracts with customers for these business services will benefit consumers without increasing the risk of anticompetitive or other undesirable behavior by AT&T.

103. One important benefit of contract carriage is that it will increase the ability of customers to negotiate service arrangements that best address their particular needs. Some customers have been able to use Tariff 12s to this end, which contain options that reflect negotiations between AT&T and particular customers. Thus, large users are unanimous in their praise of Tariff 12, and they cite a litany of beneficial contract terms that they have been able to obtain through the Tariff 12 process. They cite, for example, special protection against service outages; front-loading or back-loading of payments to accommodate cash-flow availability or other user concerns; alternative rate structures that might, for example, measure call length in one-second intervals; and escalating annual usage requirements to reflect anticipated growth. [167] These users strongly support contract carriage as a way of extending these benefits to customers that do not seek integrated Tariff 12 packages.

104. Limiting AT&T to "plain vanilla" generic tariffs, on the other hand, would substantially restrict the availability of these types of service arrangements because no single tariff can adequately incorporate all of the individually designed variables that customers desire. [168] Moreover, because the individually negotiated contract arrangements must be made generally available to other similarly situated customers, other customers can reap the benefits of these new, more specialized arrangements. Of course, to the extent that large customers are able to obtain better or cheaper telecommunications service, their cost of production decreases, which exerts downward pressure on their product prices, to the benefit of all consumers.

105. Contract carriage would further benefit consumers by unleashing competitive forces for business services to the maximum extent possible. By permitting customers to seek competitive bids from all carriers in the long-distance market - and allowing AT&T to offer customers the same types of contract deals that its competitors are already offering -- contract carriage will expand customers' choices. This, in turn, will likely result in better choices from all carriers. [169]

106. Equally significant, in the long-run, contract carriage should help to ensure that the long-distance industry *stays* competitive. Contract carriage will help to minimize the risk that tacit collusion will occur because the diversity of contracts and contract terms will make it more difficult for competitors to establish and enforce rate agreements. It would also maximize incentives to breach any such agreements, since a carrier would not have to cut rates "across the board" to do so. In contrast, permitting only generic," plain vanilla" tariffs could facilitate collusion by limiting the diversity of offerings.

107. Some parties express concern that contract carriage would increase the risk of predation and discrimination, harm resellers, and lead to the geographic deaveraging of AT&T's rates. We do not believe that these concerns are warranted for the following reasons. [170]

108. Parties asserting that contract carriage might facilitate predation argue that prices can be predatory, even if they are above cost, if they are set with "predatory" intent -- for example, to deter new entry or to discipline price-cutting competitors. CompTel faults the Notice for largely ignoring this type of behavior in its analysis of predation. It states that we incorrectly assume that above-cost prices are per se nonpredatory. [171]

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[166] CompTel Comments at 150-152;; Sprint Comments at 14-115; ACTA Comments at 30; MidAmerican Comments at 10; Hawaii Comments at 2-9, Reply at 2; Alaska Comments at 1-4; Michigan Staff Comments at 11-12.

[167] *See* Bank Coalition reply at 4-9.

[168] *See* Ad Hoc Reply at 16.

[169] As the Vice President of SABRE Computer Services put it: "I am absolutely sure I would get a better deal if AT&T were more free to compete. We've just given a significant chunk of business to MCI. I know AT&T would have done more, if it could have, to prevent that from happening. We might very well have gone with MCI, but I guarantee you it would have been at a lower price." NERA study at 25. *See also* Ad Hoc Comments at 13.

[170] In addition, GCI comments that it would be harmed by contract carriage because its primary competitor, Alascom, pools its costs under a joint services agreement with AT&T and sets its MTS and WATS rates to mirror AT&T's rates. It claims that this agreement works as a subsidy for Alascom whereby AT&T pays approximately half of Alascom's costs. GCI argues that increased flexibility for AT&T would allow Alascom to choose to mirror any rate -- generic tariff or contract-based -- that suits its purpose, thus enabling Alascom to control the amount of the subsidy. GCI Comments at 7-13. Our Notice of Proposed Rulemaking did not propose to implement a contract carriage policy for Alascom. We therefore clarify that in providing AT&T greater flexibility to offer contract-based rates, we do not extend this flexibility to Alascom. Accordingly, Alascom is precluded from mirroring AT&T's contract-based rates or custom tariff rates. This will ensure that our regulatory changes do not create problems in the Alaska market. We also recognize that GCI's concerns may be diminished in light of the announcement, on July 10, 1991, of an agreement between AT&T and Alascom's parent company, Pacific Telecom, under which AT&T agreed to purchase certain interstate facilities from Alascom and to take over Alascom's originating interstate MTS and WATS traffic in the Alaska market.

[171] In the Notice we tentatively concluded that it was unlikely that AT&T could successfully engage in "classic" predation. Noting the large sophisticated networks of AT&T's facilities-based competitors, we stated, first, it does not appear that AT&T could drive its principal competitors from the marketplace or that it would expect to be able to do so. We stated, second, that since any predatory scheme would likely require significant price cuts and losses over a substantial period of time, we did not believe that AT&T could effect a predatory scheme without detection. We said, third, that even if AT&T thought it could drive its competitors from the marketplace, it could not reasonably expect to recoup its losses because its competitors' assets would remain available to a successor and because of the likelihood of re-regulation in the unlikely event that AT&T succeeded in eliminating competition. 5 FCC Rcd at 2639 and 2642. No one seriously challenges our tentative conclusion that classic predation is unlikely.

109. The majority view among courts is that above-cost prices are presumptively not predatory, and courts place upon plaintiffs the burden of proving that such prices are unlawful. [172] Courts have stated that they are reticent to treat above-cost prices as predatory in part to avoid discouraging legitimate price competition. [173] Underlying this approach is the courts' recognition that there is a thin line between legitimate, welfare-enhancing competition and the type of behavior CompTel characterizes as "predation."

110. Assuming, however, that above cost prices can have anticompetitive effects in certain contexts, we do not believe that contract carriage would increase the risk of this occurrence. [174] According to CompTel, contract carriage could make it easier for AT&T to discipline its competitors, deter new entry, or otherwise police the market. We think that quite the opposite is true: that our contract carriage proposal reduces the ability of AT&T to engage in this type of behavior. In particular, to the extent that price disciplining is generally a tool used to establish or enforce tacit collusion, contract carriage should reduce the likelihood of this type of behavior by making tacit agreements much more difficult to reach and to enforce and by maximizing carriers' incentives to breach any such agreements. [175]

111. Moreover, there is no reason to believe that we would be unable to detect this kind of behavior if it occurs. Behavior that might produce anticompetitive results is not likely to be subtle. [176] In any case, we find that the public interest would not be well-served by denying all customers the ability to seek individually negotiated contract terms from AT&T in order to eliminate any possible increased risk. Rather, we agree with DOJ that in light of the substantial benefits of contract carriage, such would be a very expensive form of insurance. [177]

112. Nor are we convinced that contract carriage will present an undue risk of discrimination. First, we are requiring AT&T to make its contracts generally available to similarly situated customers so as to comply with the §202(a) nondiscrimination provisions of the Act. Second, we have found that there is substantial competition throughout the outbound business services market. This competition extends not only to large business customers, but also to smaller ones, who are the principal focus of many smaller IXCs. [178] This competition will help to ensure that all customers purchasing business services subject to streamlined review receive just, reasonable and nondiscriminatory rates, regardless of whether the purchase is made pursuant to generic or contract-based tariffs.

113. Moreover, the vast majority of customers purchasing business services from AT&T take these services under generic tariffs. In fact, AT&T's 1990 Basket 3 revenues were vastly in excess of its Tariff 12 and 15 revenues. It is very unlikely, therefore, that AT&T would limit discounts for business services to those taking these services under contract and risk losing these other business services customers to its competitors. [179]

114. We do not believe that contract carriage will adversely affect residential customers. AT&T's residential services will remain subject to price cap regulation. The productivity index and consumer dividend that the Commission built into the price cap formula requires AT&T to lower residential rates two percent a year on an inflation-adjusted basis and will ensure that residential rates remain just and reasonable, regardless of any changes in

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[172] The majority test, like the minority test, uses average variable cost (AVC) as a boundary determining whether a price is presumptively predatory or non-predatory. Prices above AVC are presumed lawful -- the burden is on the plaintiff to show that the prices are predatory. Below AVC prices are presumed predatory, and the defendant bears the burden of disproving predatory intent. The circuits split, however, in their treatment of prices above average total cost (ATC). The majority test holds that prices above ATC are *per se* lawful. Barry Wright Corp. v. ITT Grinnell Corp., 724 F. 2d 227, 233-236 (1st Cir. 1983); Henry v. Chloride, Inc., 809 F. 2d 1334, 1345-1346 (8th Cir. 1987). The minority test, however, recognizes the possibility that prices above ATC can be predatory if the plaintiff can prove by clear and convincing evidence that the defendant's pricing policy was predatory. William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F. 2d 1014, 1034-1036 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

[173] *See* Barry Wright Corp. v. ITT Grinnell Corp., 724 F. 2d at 233-236.

[174] Parties have previously argued that Tariff 12 and price caps would lead to predatory behavior by AT&T, but there is no evidence that this is occurring. Indeed, some parties argued that Tariff 12 and price cap regulation would make it impossible for small IXCs to survive. However, there has been no evidence of any significant shrinkage in the number of smaller IXCs. On the contrary, between March and December 1990, the number of IXCs purchasing equal access increased from 289 to 304 Summary of Long Distance Carriers, Industry Analysis Division, FCC, Table 2, p. 7 (released February 28, 1991). Moreover, a number of small carriers have been doing quite well. Thus, while AT&T's toll revenues declined during 1990, WilTel and Cable & Wireless each experienced revenue growth in excess of 25 percent. In addition, two other small carriers, RCI Long Distance and LDDS Communications, each enjoyed revenue growth in excess of 35 percent. *See* Long Distance Market Shares: First Quarter, 1991, Industry Analysis Division, FCC, June 28, 1991 at Table 4.

[175] *See* para. 106, *supra*.

[176] *See* DOJ Reply at 46.

[177] AT&T may not impose conditions in its contracts, such as those that caused us to reject the RCI Tariff 15 offering, that could have anticompetitive consequences and conflict with AT&T's obligations under the Act. AT&T Communications, Inc., CC Docket No. 90-11, adopted August 1, 1991. We will review AT&T's contract-based tariffs before they take effect so that we have the opportunity to suspend or reject any contract-based tariff that we find conflicts with a statute or agency regulation or order. In addition, if we have reason to believe that a contract that has taken effect is not lawful, we will initiate an investigation of such a contract. Contract rates or terms can also be challenged through the complaint process.

[178] *See, e.g.*, ACTA Comments at 1-2. As noted, AT&T's market share for the lower-volume Basket 3 services is 55 percent, less than its overall market share, and AT&T has been pricing ProAmerica service considerably below the upper rate band for that service. *See* paras. 13 and 49, *supra*.

[179] Some would argue that AT&T will nonetheless raise its generic tariff rates and offer contracts to only those customers that threaten to switch carriers. This scenario is also unlikely. The administrative burden that AT&T would incur to switch large numbers of customers from tariffed service to contracts should further encourage AT&T to set tariff rates at reasonable levels.

AT&T's rates for other services. Moreover, we note that AT&T's residential services are currently priced below the Basket 1 ceiling. This is significant for two reasons: First, it is inconsistent with arguments that AT&T will keep residential service rates as high as possible so that it can lower business service rates as much as possible. Second, it is indicative of the growing competition for residential services. As competition for these services increases further, there will be additional market pressures to ensure that residential consumers receive just and reasonable rates and the best possible service.

115. Nor do we believe that contract carriage will have an adverse effect on resellers. Resellers currently purchase services not only from AT&T, but from other facilities-based carriers as well. The fact that AT&T's competitors have been making contract offerings and still provide service to resellers indicates that contract rates would not adversely affect this segment of the market. Moreover, resellers, like other users, are valued customers -- in fact, they are large customers. It is not reasonable to assume that AT&T will refuse to present them with viable service options at reasonable rates. In any event, as noted above, the terms of AT&T's contracts must be filed with the Commission and made available to all similarly situated customers, including resellers. Moreover, our longstanding policy barring restrictions on resale applies with full force to contract carriage.

116. Likewise, there is no evidence that contract carriage will lead to geographic rate deaveraging. As noted above, there are a substantial number of large business customers located in whole or in part in rural areas. These customers have been successful in obtaining Tariff 12 arrangements, and they are just as likely to be successful in obtaining favorable contract terms.[180] Moreover, we prohibit AT&T from including in its contract rates the types of geographic restrictions found unlawful in the Commission's *Tariff 12* decision. [181]

(b) Specifics of Contract Carriage Policy

i. The Notice

117. In the Notice, we proposed to require AT&T to file, within thirty days of the effective date of its customer contracts, the full contract and a brief summary thereof. We proposed that the contract summary be available for public inspection and that more extensive information be made available subject to protective orders designed to protect confidential commercial information. [182]

ii. Positions of the Parties

118. Some parties express concern with our proposal to require AT&T to file the full text of its customer contracts. They state that these contracts frequently contain proprietary customer information that could be used to analyze customers' business operations and plans, and they question whether protective orders will afford users adequate protection against disclosure of such information to their competitors. [183] NTIA expresses concern that this aspect of the contract carriage proposal would lead to protracted case-by-case administrative proceedings between AT&T and its competitors to determine whether the full contract must be released. [184] ICA indicates that many users would prefer Tariff 12s to contracts if they are required to file their contracts. [185]

119. AT&T states that contracts may contain a significant amount of proprietary information that is not required to be filed under section 203(a) of the Act. AT&T suggests that it file syllabi, in lieu of contracts, containing the type of information usually included in a tariff filing, as well as summaries of these syllabi.[186] AT&T states that only the summary should be generally available and that the syllabi should be made available subject to the terms of a protective agreement. [187]

120. DOJ urges us to preserve the confidentiality of rates to the maximum extent allowed by law. [188] It states that by preserving the confidentiality of rates, we would deprive carriers of the type of knowledge that facilitates price collusion. [189] In addition, it states that requiring carriers to disclose rates may discourage them from lowering prices so that they can avoid damaging their relationship with customers paying higher prices. [190] On the other hand, the Bank Coalition and TCA assert that users would be best-served if they have access to as much information as possible in evaluating their competitive options. [191] The Bank Coalition asks that not only AT&T, but other IXCs as well, be required to file contract rates for contracts worth more than some threshold amount. [192] Several of AT&T's competitors argue that if we do not require sufficient information in AT&T's contract filings, we will not be able to perform our statutory duty to ensure that rates are reasonable and nondiscriminatory. [193]

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[180] *See* note 102, *supra*.

[181] *See* AT&T Communications Revisions to Tariff FCC No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, 4938 (1989). In this decision, the Commission found unlawful various Tariff 12 options that contained geographic restrictions upon availability. The Commission stated that if geographic restrictions were necessary due to technical limitations imposed by certain LEC switching equipment or AT&T POP switch restrictions, the restrictions on availability must be stated in terms of these technical limitations. *Id.* at para. 58.

[182] 5 FCC Rcd at 2642.

[183] ICA, for example, states that contracts would contain information about a user's network configuration and services that might reveal the nature of its operations and future plans. ICA states that violations of protective orders would be very difficult to detect, and that users would face the prospect of collateral proceedings in order to protect themselves against disclosure of competitively sensitive information. ICA Comments at 16-17. *See also* Ad Hoc Comments at 31.

[184] NTIA Reply at 23-24.

[185] *Id.*

[186] AT&T Comments at 67-68.

[187] Id. at 68-69.

[188] DOJ Reply at 46.

[189] *Id.* at 45.

[190] *Id.* at 45-46.

[191] *See* Bank Coalition Comments at 8; TCA Comments at 18-19.

[192] The Bank Coalition Comments at 17. *See also* the Broadcasters Comments at 19-20.

[193] CompTel Comments, Appendix H, at 32-33; Sprint Reply at 103-105; MCI Reply at 42; IDCMA Reply at 60-61; ACTA Reply at 12-13.

iii. Discussion

121. We now alter the filing requirement proposed in the Notice. In particular, we require AT&T to file, fourteen days prior to the effective date of each of its customer contracts, a tariff summarizing that contract and containing the following information: (1) the term of the contract, including any renewal options; (2) a brief description of each of the services provided under the contract; (3) minimum volume commitments for each service; (4) the contract price for each service or services at the volume levels committed to by the customers; (5) a general description of any volume discounts built into the contract rate structure; and (6) a general description of other classifications, practices, and regulations affecting the contract rate. As discussed below, the provision of this information will satisfy the requirements of section 203(a) of the Act, while avoiding disclosure of customer proprietary information or information that might increase the risk of tacit collusion in the marketplace.

122. The filing requirement we adopt is different from that proposed in the Notice in two respects: (1) AT&T must file a contract-based tariff that complies with section 203 of the Act in lieu of the entire contract and a much briefer summary of it; and (2) AT&T must file these tariffs on fourteen days notice, rather than within thirty days after the contract's effective date. These modifications, we believe, will ensure that our contract rate policy complies fully with the provisions of the Act (*see* discussion *infra)* . In addition, they should yield significant benefits. First, in abandoning our requirement that AT&T file the full text of its contracts, we minimize the risk to users of disclosure of any sensitive, proprietary information that may be contained in these contracts. [194] Second, by limiting the information to be contained in AT&T's contract-based tariffs to that required under the Act, we reduce opportunities for carriers to engage in price collusion or other coordinated anticompetitive behavior.[195] Third, by abandoning the two-tiered filing mechanism outlined in the Notice, we avoid the potentially significant administrative burdens associated with fashioning protective orders and ruling on alleged violations of them.[196]

(c) Lawfulness of Contract Carriage

i. The Notice

123. In the Notice, we tentatively concluded that we are permitted to authorize AT&T to provide certain services on a contract basis, provided that these contracts are made available under substantially similar circumstances and conditions to similarly situated customers.[197] We stated that an absence of explicit statutory authorization for carrier-customer contracts would not be a bar to such contracts and that, in any case, sections 211(b) and 219(a) appeared to authorize us to permit these contracts. [198] In addition, citing *Sea-Land Service, Inc. v. ICC* [199] which upheld the ICC's contract rate policy, as well as precedent upholding FERC's selective discount policy[200] we tentatively concluded that contract carriage can be consistent with the nondiscrimination provisions of the Act. [201]

ii. Positions of the Parties

124. AT&T, API, Ad Hoc, NTIA and the Broadcast Coalition argue that contract carriage is fully consistent with the provisions of the Act. AT&T states that section 203(b) empowers us to modify the filing requirements of section 203(a) to permit the filing of contract rates. [202] Others, supporting the analysis in the Notice, argue that sections 211(b) and 219(a) provide authority for the filing of contract rates. [203] These parties also support our tentative conclusion that contract rates do not inevitably violate the nondiscrimination provisions of the Act. [204]

125. Some parties, principally AT&T's competitors, assert that contract carriage by AT&T would violate the Act. They state, first, that sections 211(b) and 219(a) of the Act do not permit us to abrogate section 203 filing requirements. In addition, they argue that our original proposal to permit AT&T to file its contract rates *after* the effective date of the contract is inconsistent with the *Maislin* decision, which was issued after we released the Notice in this proceeding. These parties argue that under *Maislin*, AT&T may not offer service until its rates are filed and available for public inspection. [205] In addition, claiming that *Sea-Land* is inapplicable to the Communications Act, AT&T's competitors and TCA assert that contract rates would constitute a *per se* violation of the nondiscrimination provisions of the Act. [206]

iii. Discussion

126. We find that we have ample authority under the Communications Act to adopt a contract-based rates policy. We conclude that this policy is consistent with section 203 of the Act, and we therefore need not reach the issue of whether sections 211(b) and 219(a) of the Act authorize

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[194] Of course, we retain the right to require the filing of the full contract in the context of an investigation or complaint proceeding, subject to any necessary and appropriate protective orders. *See* 47 U.S.C. § 211(b).

[195] DOJ Reply at 45; Bank Coalition Reply at 10-11. *See also* AT&T Comments at 68, n. *, *citing*, Water Transport Association v. ICC, 722 F. 2d 1025, 1032 (2d Cir. 1983).

[196] As discussed herein, AT&T's contracts may not limit resale or contain impermissible geographic restrictions. In addition, they may not include services not subject to further streamlined regulation, and they may not bundle CPE with transmission services.

[197] 5 FCC Rcd at 2642-2643.

[198] Section 211(b) of the Act authorizes the Commission to require the filing of "any other contracts of any carrier", while section 219(a) authorizes the Commission to require carriers to file annual reports containing "information in relation to charges or regulations concerning charges, or agreements, arrangements, or contracts affecting the same". Id. at 2643, *citing*, 47 U.S.C. §§ 211(b) and 219(a).

[199] 738 F. 2d 1311 (D.C. Cir. 1984) (hereinafter "Sea-Land").

[200] Associated Gas Distributors v. FERC, 824 F. 2d 981 (D.C. Cir. 1987).

[201] 5 FCC Rcd at 2642-43.

[202] AT&T Comments at 64-68.

[203] API Comments at 25-28; Broadcast Coalition Comments at 17-20; NTIA Reply at 22.

[204] AT&T Comments at 69-73, Reply at 83-87; Ad Hoc Comments at 28-30; NTIA Reply at 20-21.

[205] NTIA Reply at 22-23.

[206] CompTel Comments at 20-21 and Appendix H at 22-24 and 27-34; Sprint Comments at 167; TCA Comments at 17-19; MCI Reply at 40-41.

an alternate filing mechanism. [207] We also conclude that the contract carriage approach we are authorizing is consistent with the nondiscrimination provisions of the Act.

127. Section 203(a) requires that AT&T file "schedules" showing its charges, classifications, practices, and regulations affecting its charges. This provision gives us broad discretion to define the type and format of information that AT&T must file. Requiring AT&T to provide section 203 information in the form of a contract-based tariff is clearly within our permissible discretion under this provision. Indeed, the United States Court of Appeals for the District of Columbia Circuit has held that the Communications Act permits the filing of contract-based tariffs.[208]

128. We also find that our contract carriage policy is consistent with the § 202(a) nondiscrimination provisions of the Act. *Sea-Land* unequivocally establishes that contract rates are not *per se* unlawful, provided they are made available to similarly situated customers. [209] While some parties argue that *Sea-Land* is inapplicable to the Communications Act, the United States Court of Appeals for the District of Columbia Circuit recently rejected that argument. After finding that the Communications Act does not impose any greater nondiscrimination requirements than does the ICA, the court stated: "[u]nder *SeaLand* then, rates arrived at through negotiations between a carrier and an individual customer and then made generally available to other similarly situated customers do not *per se* violate the Communications Act if the rates are filed with the Commission."[210]

(d) Discrimination Standard

129. Section 202(a) of the Communications Act provides: "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service. ..."[211] Courts have held in analogous circumstances, and we now find, that individually negotiated contracts are not unreasonably discriminatory if their terms are made generally available to other similarly situated customers willing and able to meet the contract's terms. [212]

130. In the *Competitive Carrier* proceeding, the FCC found that carriers lacking market power are presumptively unable to engage in unreasonable discrimination. [213] Although we do not now hold that AT&T is a "nondominant" carrier under *Competitive Carrier*, we find that competition in the business services market is substantial. We believe that this competition limits AT&T's ability to discriminate unreasonably in its provision of contract service.

131. In the event a complaint is filed alleging that contract rates are discriminatory, the complainant, as is always the case under section 208 of the Act, bears the burden of proof. [214] Accordingly, success in such a proceeding would require the complaining party to make an initial *prima facie* case of discrimination. In order to establish such a case, the complainant must show that: 1) a customer seeks substantially the same service arrangement under the same terms and conditions that were made available to another customer; and, 2) the carrier refused to make service available to that customer on those terms. Alternatively, the complainant may show that the contract is, by its terms, not generally available to other similarly situated customers. For example, a complainant could establish a *prima facie* case by showing that the contract contained impermissible restrictions on geographic availability. [215]

132. If a complainant establishes this *prima facie* case, the burden would then shift to the carrier to show that the discrimination was reasonable.[216] Courts have recognized that the sufficiency in a given instance of any proffered justification is, by nature, a fact-intensive inquiry. [217] These inquiries are therefore well-suited to case-by-case adjudication in the complaint process.

B. Regulatory Treatment of Other Services

(1) 800 Services

(a) Assessment of Competition in 800 Services

i. The Notice

133. The Notice tentatively concluded that the 800 services market is not yet fully competitive. We stated that while 800 services are used primarily by medium and

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[207] In light of our decision to require that contract-based tariffs be filed with the Commission prior to their effective date, we also find it unnecessary to address claims that the post-effectiveness filing of contracts proposed in the Notice would violate the tariff filing requirements of § 203. *See* Maislin, 110 S. Ct. at 2768-72.

[208] MCI Telecommunications Corp. v. FCC, 917 F. 2d 30, 37-38 (D.C. Cir. 1990). Previously, the Court rejected the argument that ICA filing requirements, which are nearly identical to those in Section 203 of the Communications Act, preclude the filing of contract-based rates. Sea-Land, 738 F. 2d at 1318, n. 11.

[209] Sea-Land, 738 F. 2d at 1316-1319. Although Sea-Land was decided after Congress amended the ICA to specifically allow contract rates to be filed, Staggers Rail Act of 1980, Pub. L. No. 96-448, § 202(a), 94 Stat. 1895, 1908 (codified at 49 U.S.C. § 10713(b)), the case was decided on the law as it existed in 1978. *See* Sea-Land, 738 F. 2d at 1318-1319. At that time, the ICA, like the Communications Act, did not contain a specific provision for the filing of carrier-customer contracts.

[210] MCI Telecommunications Corp. v. FCC, 917 F. 2d 30, 38 (D.C. Cir. 1990) (hereinafter "Tariff 12 Decision").

[211] 47 U.S.C. Sec. 202(a).

[212] Sea-Land, 738 F. 2d at 1317. *See also* MCI Telecommunications Corp. v. FCC, 917 F. 2d at 38.

[213] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor, First Report and Order, 85 FCC 2d at 21 and 31.

[214] *See* Southern Railway Co. v. Seaboard Allied Milling Co., 442 U.S. 444, 454-55 (1979).

[215] *See* para. 116, and note 181 *supra*. For purposes of establishing a *prima facie* case, the contract terms and conditions we refer to are only those that appear in the contract-based tariff.

[216] Courts have found that such factors as cost differences or differences in competitive circumstances or conditions may justify discrimination. *See, e.g.,* Eastern-Central Motor Carrier Ass'n. v. United States, 321 U.S. 194 (1944); L. T. Barringer & Co. v. United States, 319 U.S. 1, 13-14 (1943); MCI Telecommunications Corp. v. FCC, *supra* at 39; Associated Gas Distributors v. FERC, *supra;* Sea-Land, *supra* at 1317; Dresser Industries, Inc. v. ICC, 714 F. 2d 588, 599-602 (5th Cir. 1983); American Broadcasting Co. v. FCC, 663 F. 2d 133, 139 (D.C. Cir. 1980); and AT&T v. FCC, 449 F. 2d 439, 449-50 (2nd Cir. 1971).

[217] *See, e.g.,* American Trucking Associations, Inc. v. FCC, 377 F. 2d at 131; L. T. Barringer & Co. v. United States, *supra* at 6-7. *See also* Texas & Pacific Railway v. ICC, 162 U.S. 197, 233-34 (1896).

large-sized business customers who tend to be sophisticated in their market choices and that possess some degree of purchasing power, the fact that 800 numbers are not "portable" reduces the competitiveness of the 800 services market.

ii. Positions of the Parties

134. AT&T and the SDN Users Association argue that the 800 services market is vigorously competitive. They claim that MCI and Sprint both offer a broad array of domestic and international 800 services and that small IXCs compete, as well, in regional markets. AT&T claims that the competitiveness of 800 service is underscored by the fact that its market share in 800 services has declined to about eighty percent in just three years and that at the end of the first year of price caps, its 800 services were priced from seven to thirteen percent below their upper limits.

135. AT&T also argues that the Notice overstates the importance of number portability to 800 services competition. AT&T claims that it is not very expensive for most customers to change 800 numbers, and, in support of this claim, submits a survey of its 800 service customers. This survey purports to show that the cost of changing an 800 number that accounts for billings of over $2500 per month averages less than six percent of the annual billings for that number.[218] AT&T also states that 12,000 AT&T 800 service customers have switched to competitors' services during the last three years; pre-1987 numbers account for only 20 percent of total AT&T numbers in use today; and its 800 service customers disconnect their service at a rate that is fifteen percent greater than the rate of disconnects for outbound switched services.[219]

136. DOJ states that it lacks sufficient information to assess the significance of the lack of 800 number portability to competition in 800 services. It notes, however, that the "[t]he problem associated with the lack of number portability resembles the common problem faced by all parties who enter into relationships under which they make large not easily transferable investments." [220]

137. Most other parties that address the issue, including AT&T's competitors, other user groups, and NTIA, support the Notice's tentative conclusion that number portability represents at least a partial barrier to full competition in 800 services. Sprint submits a study concluding that forty percent of 800 service subscribers would likely switch IXCs in order to receive a ten percent discount if switching did not require an 800 number change, whereas only 20 percent would likely switch if switching required an 800 number change. [221] Sprint and MCI also challenge the validity of AT&T's survey of 800 service customers and the usefulness of the other information submitted by AT&T.

iii. Discussion

138. We affirm our tentative conclusion that the 800 services market is not yet fully competitive. A broad range of commenters maintain that 800 number portability is a prerequisite to vigorous competition throughout the 800 services marketplace. We agree. At the same time, it is apparent from the record that the lack of 800 number portability is a crucial competitive factor for a relatively small portion of 800 service subscribers. Judging by Sprint's study, twenty percent or fewer of 800 service users are foreclosed by their commitment to their 800 number from considering a change in IXCs that they might otherwise make. [222] For the large majority of 800 service subscribers, the lack of number portability is a less significant factor.

139. AT&T counters Sprint's study and the comments of most users with data of its own that purports to demonstrate the lack of 800 number portability is not an impediment to vigorous 800 services competition. We are not persuaded by this data. First, even accepting the validity of the findings in AT&T's survey, the fact that the average cost of changing an 800 number for users generating at least $2500 per month in billings may be relatively low does not disprove that the cost for some users in this group is substantially higher. Second, AT&T's survey is deficient in various respects. Thus, in addressing the prospective costs a customer would incur if it changed its 800 number, AT&T ignores what may be the most significant costs involved for some customers -- forfeiting the value of their old 800 numbers, including any value inherent in the number itself, as well as any other goodwill associated with the number. Moreover, AT&T appears to have understated the prospective costs of an 800 number change, limiting media costs, for example, to only one advertising vehicle and to edits of previous advertisements, rather than a larger ad campaign, and ignoring volume discounts that may be lost during a transitional period in which subscribers divide their traffic between two carriers.

140. None of the other evidence submitted by AT&T is inconsistent with our conclusion that number portability is a partial barrier to competition in 800 services. For example, the fact that the disconnect rate for AT&T's 800 service is higher than for other services proves little, particularly given that AT&T does not indicate whether its disconnecting customers have switched to another IXC or have simply terminated their 800 service. Likewise, AT&T's claims that only 20 percent of its 800 numbers were placed into service prior to 1987, or that 12,000\AT&T 800 service subscribers have switched IXCs, are not determinative of AT&T having no power with respect to any 800 customers.

(b) Regulatory Treatment of Basket 2 Services

(i)The Notice

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[218] AT&T states that one of the ways users with widely known 800 numbers can minimize the disruptive effect of an 800 number change is by purchasing 800 referral service so that callers dialing the old number hear a recording informing them of the new number.

[219] *See* AT&T Comments at 37, 40-41; *ex parte* letter from Joel E. Lubin, Regulatory Vice President, Government Affairs, AT&T, to Donna Searcy, Secretary, FCC, July 18, 1991.

[220] DOJ Reply at 53-54.

[221] According to Sprint, for larger discounts, the disparity between the percentages of customers willing and not willing to switch IXCs grows.

[222] This assumes that AT&T's 800 services are, on average, priced about ten percent higher than its competitors' 800 services. In fact, the price differential may be slightly less, and in some cases AT&T's high volume 800 services may even be priced below those of its competitors. *See* Sprint Comments at App. 12.

141. The Notice tentatively concluded that we should defer maximum streamlining for 800 service until 800 numbers are portable. We also sought comment on whether current levels of competition for 800 services warrant an interim regulatory approach for 800 services prior to the availability of 800 number portability, and, if so, on what such an approach should be.[223] In addition, we sought comment on the impact, if any, of the competitiveness of 800 services on competition in other market sectors.[224]

(ii) Positions of the Parties

142. Most parties support the Notice's tentative conclusion that maximum streamlining for AT&T's 800 service should not be implemented before 800 numbers are portable. AT&T and the SDN Users, arguing that the 800 services market is fully competitive even without number portability, urge us to adopt maximum streamlining for AT&T's 800 services. a [225]

143. Some of AT&T's competitors and NTIA argue, further, that we should not permit AT&T to bundle 800 services with other services.[226] They argue that through bundling of 800 services with other services, AT&T can "leverage" market power in 800 service to obtain an unfair advantage in the marketplace for other services. In particular, they contend that AT&T is able to coerce its "captive" 800 service subscribers into taking other services from AT&T by linking the availability of 800 service discounts to the purchase of other services. MCI states that ability to bundle 800 service in its Tariff 12 options, more than any other single factor, accounts for AT&T's successes in the large customer market segment. [227] Sprint argues that if AT&T offers 800 service in its customer contracts, it will be able to offer 800 service at reduced rates to those customers with relatively elastic demand and at higher rates to those customers taking service under Basket 2 tariffs. Sprint states, additionally, that permitting AT&T to offer 800 service in its customer contracts reduces pressures on AT&T to lower its tariffed rates for 800 service. [228]

144. AT&T, Ad Hoc, the Bank Coalition, and the SDN Users oppose restrictions on AT&T's ability to bundle 800 or inbound services with other services. [229] AT&T and the SDN Users deny that AT&T has market power in 800 services. AT&T argues, further, that it would be unfair to prohibit AT&T from bundling 800 or inbound service with other services given that AT&T's competitors routinely offer bundled packages of such services.

145. AT&T and Ad Hoc argue that permitting the inclusion of 800 service in AT&T's customer contracts will benefit customers by affording customers maximum flexibility to negotiate contracts that address their service requirements. AT&T and Ad Hoc assert that the retention of price cap regulation for AT&T's tariffed 800 services will protect "piecepart" 800 service customers from excessive 800 service rates. Ad Hoc denies that permitting inbound service in Tariff 12s adversely affects the rates paid by purchasers of Basket 2 800 services. According to Ad Hoc, prohibiting inbound service in Tariff 12s would hurt Tariff 12 customers by denying them the integration flexibility that distinguishes Tariff 12 from piecepart services without helping customers that purchase 800 service under Basket 2 tariffs. [230] Ad Hoc also denies that 800 or inbound bundling presents leveraging risks. It states that so long as Basket 2 rates are properly controlled, AT&T will be unable to use leverage in its bundled offerings.[231]

(iii) Discussion

146. We have found that the lack of 800 number portability is an impediment to full competition in 800 services. Although it appears that this factor materially affects only a minority of 800 service subscribers, we are concerned that it may be a significant enough factor for a sufficient number of customers to have an overall impact on competition in 800 services. In a companion order adopted today, we have taken steps to expedite the portability of 800 numbers.[232] The requirements we adopt in that order should ensure 800 number portability in approximately eighteen months. Until 800 numbers are portable, however, we find that 800 services should be more fully regulated than other business services.

147. Consistent with this finding, we decline to extend further streamlined regulation to AT&T's 800 services at this time. We instead retain price cap regulation of these services until the general availability of 800 number portability. By maintaining the price cap ceiling and service banding requirements, we ensure that all purchasers of AT&T's 800 services pay just and reasonable rates for these services, regardless of their commitment to their 800 number. [233]

148. 800 bundling presents more difficult issues. Some of AT&T's competitors express concern that AT&T would be able to improperly leverage market power in 800 or inbound services in its contract and Tariff 12 negotiations with customers to gain an advantage in the provision of other services. We believe that the risk and impact of leveraging may be overstated by these parties. Given that most 800 service subscribers are not "captive" customers,

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223 *See* 5 FCC Rcd at 2641, para. 122.

224 5 FCC Rcd at 2636, para. 72.

225 AT&T Comments at 29-44; SDN Users Reply at para. 3. *See also* API Comments at 7.

226 *See*, for example, NTIA Reply at 15-16; MCI Comments at 31-32 and Reply at 19; Sprint Comments at 140; CompTel Comments at 157 and Reply at 3440; Cable & Wireless Comments at 30; Schneider Comments at 2.

227 MCI Comments at 31-32.

228 *See* Sprint Comments at App. 15 at 22-23 ("Market Power in Long Distance Telephone Markets" by Steven Salop, Steven R. Brenner, and Gary Roberts).

229 AT&T Reply at 46-47; Ad Hoc Reply at 15; Bank Coalition Reply at 12-13; SDN Users Reply. *See also* API Comments at 7 (AT&T should be accorded maximum flexibility in entering into custom or competitive rate arrangements with large organizations).

230 Ad Hoc Reply at 15.

231 *Id.*

232 *See* Provision of Access for 800 Service, Memorandum Opinion and Order on Reconsideration, CC Docket No. 86-10, adopted August 1, 1991.

233 Because no party has identified any other significant barriers to 800 services competition, we intend to implement, on our own motion or on petition, further streamlined regulation for AT&T's 800 services when 800 number portability is generally available.

any ability that AT&T may have to leverage market power in 800 or inbound services by bundling these services with other services is probably limited to a relatively small number of customers. In addition, if the amount of 800 or inbound service purchased by these customers, relative to their purchases of other aspects of an integrated package, is small, leveraging is unlikely because it is unlikely that an 800 or inbound service discount will control the customer's purchases of the overall package. AT&T's ability to leverage is also curtailed by our retention of the price cap ceilings for Basket 2 services.

149. Nevertheless, it appears that some customers may, as a practical matter, be unable to change their 800 number without incurring substantial costs. We are not convinced that AT&T currently lacks the ability to leverage market power in 800 or inbound services with respect to these customers through the inclusion of 800 and inbound services in contracts and Tariff 12s.[234] Therefore, until 800 numbers are portable, we preclude AT&T from including in contracts and new Tariff 12 options any 800 or inbound service.[235]

150. While we prohibit AT&T, until 800 numbers are portable, from entering into new contracts or Tariff 12 options that include 800 service or an inbound component, we do not believe the public interest would, on balance, best be served by invalidating Tariff 12 options already on file with the Commission at the time this Order was adopted merely because they include inbound service.[236] Most of AT&T's existing Tariff 12 options involve relatively small amounts of inbound service. Inbound usage is less than twenty percent of total usage in about half of these options and less than thirty percent in two thirds of the options. It therefore appears that allowing existing Tariff 12 options on file as of the date of this Order to continue in effect until customers have the new option of terminating them at the point of number portability will not significantly affect competition in the marketplace. Moreover, 800 numbers will be portable in approximately eighteen months. At that time, we would have no reason, based on the record in this proceeding, to prohibit an inbound component in any of AT&T's Tariff 12 packages. On the other hand, existing Tariff 12 customers may experience hardship if they have to reconfigure their networks to remove the 800 component. Particularly in light of the relatively limited transition period to full number portability, we decline to impose on existing Tariff 12 customers this hardship and the burden of renegotiating their Tariff 12 packages.[237]

151. We do, however, require AT&T to permit customers with Tariff 12 packages that include inbound service to terminate these packages within ninety days of the time 800 numbers become portable without the imposition of any termination liabilities. This measure will ensure that customers who may be dependent on a specific 800 number cannot be leveraged by AT&T into long-term commitments for Tariff 12 packages that prevent their taking advantage of 800 number portability when it arrives.

(2) Basket 1 Services

(a) Assessment of Competition for Operator Services

(i) The Notice

152. The Notice tentatively concluded that recent developments appear to have lessened barriers to effective competition in the provision of operator services. We sought comment on the extent to which barriers still remain.

(ii) Positions of the Parties

153. AT&T argues that operator services are now fully competitive. It claims that its share of operator service revenues has declined by more than 25 percent in three years, and that presubscription of BOC and GTE payphones and the ability of its competitors to validate BOC and GTE calling cards have resulted in intense competition in the operator services market.[238]

154. DOJ argues that entry barriers in the operator services area appear lower than for other services. In addition, it states that the competitiveness of the operator services market should be gauged not so much by AT&T's market share, but by the ability of callers to choose freely among operator service providers.[239]

155. AT&T's competitors in the operator services market, on the other hand, assert that AT&T retains 90 percent of the operator services market. In addition, they argue that significant barriers to operator services competition remain, including: (1) the refusal of many independent LECs to provide billing and collection services or validation data to AT&T's competitors, and the higher

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[234] Leveraging could occur, for example, if AT&T offered a "captive" 800 service subscriber discounts on 800 service conditioned upon the customer's purchase of another service from AT&T -- for example, if AT&T offered a customer a bundled contract of 800 service and WATS service, with ten percent discounts on each. In this example, assuming equal usage of 800 and WATS, an AT&T competitor would have to offer a twenty percent discount on WATS in order to win the customer's WATS business. In other words, because the customer is committed to AT&T's 800 service, AT&T's competitors would have to include, in their WATS discount, compensation to the customer for foregoing the 800 service discount available in AT&T's package.

[235] As noted above, we are not, of course, resolving all questions with respect to the lawfulness of Tariff 12 in this proceeding. *See* para. 72, *supra*.

[236] We are grandfathering Tariff 12 options, rather than Tariff 12 customers, so that Tariff 12 options remain generally available.

[237] We recognize that some customers may be in the middle or near completion of negotiations for a Tariff 12 package that includes an inbound component. These customers may be inconvenienced to various degrees in light of our decision to grandfather only those Tariff 12 options that were on file as of the adoption of this order. Nevertheless, unlike customers who are already taking service under a Tariff 12 option, these customers will not face the burden of reconfiguring their existing service offering. Moreover, unlike customers for whom Tariff 12 options have already been filed, these customers are in varying stages of the negotiation process. We do not think that we should set a standard for grandfathering that attempts to evaluate the status of these negotiations and measure the relative burdens of renegotiation. Such a standard would be arbitrary at best. Finally, we are concerned that if in this order we had permitted AT&T some "window of opportunity" in which to negotiate and file additional Tariff 12 options that include inbound components, we would have undermined the effectiveness of the bundling restrictions we adopt herein.

[238] AT&T Comments at 49-52.

[239] DOJ Reply at 63-64.

rates charged AT&T's competitors when they do; [240] (2) the unavailability to AT&T's competitors of 0-traffic, which they claim may account for 43 percent of all 0 calls; [241] (3) AT&T's large embedded base of calling card customers which, AT&T's competitors argue, confers an advantage on AT&T in competing for presubscription rights – an advantage that competitors say will significantly increase when AT&T replaces its calling cards with proprietary cards that no other IXC can validate; (4) AT&T's continued monopoly in most independent LEC territories over 0+ calling (which includes calls billed to credit cards, the called party, and third numbers); and (5) AT&T's refusal to accept 1-800 or 950-10XX access codes, which, its competitors state, forces premises owners to presubscribe to AT&T.

(iii) Discussion

156. While significant barriers to operator services competition have clearly eroded, it is not clear from the record the extent to which other barriers may yet remain. Moreover, new developments, including the LECs' implementation of the Line Identification Data Base (LIDB), the introduction of new calling card formats and proprietary calling cards by IXCs, and our recent decision requiring unblocking of 10XXX access and requiring AT&T to establish 1-800 or 950-10XX access, [242] are changing the operator services landscape at a rapid pace. Further changes, such as the substitution of billed party preference for payphone presubscription, have been proposed. Given these considerations, firm conclusions about the nature and extent of operator services competition are premature at this time.

(b) Assessment of Competition for *IMTS*

(i) The Notice

157. In the Notice, we tentatively concluded that barriers to effective competition in IMTS appear to have been substantially reduced in recent years as AT&T's competitors have been able to obtain operating agreements to provide IMTS in most major foreign markets. Noting, however, AT&T's high market share, and the fact that competition had only recently been established in many foreign markets, we tentatively concluded that it may be premature to consider IMTS fully competitive. [243]

(ii) Positions of the Parties

158. AT&T, API and the SDN Users Group argue that the IMTS market is now fully competitive.[244] AT&T claims that its competitors have operating agreements with 126 countries – which account for 94 percent of AT&T's total international revenues. [245] In addition, it cites alleged excess supply capacity on international facilities as evidence that the market is fully competitive. [246] API reports that most of its member companies rely on AT&T for only about half of their international private line and switched services.[247] SDN claims that AT&T faces competition in all major international markets. It states that competition is lacking only in markets that AT&T's competitors choose not to serve because traffic volumes are too low to cover the costs of providing service. [248]

159. AT&T's competitors argue that IMTS is not yet fully competitive. They dispute AT&T's claims that its competitors have operating agreements in 126 countries. [249] They also claim that AT&T is able to obtain preferable accounting arrangements, which, they claim, lower AT&T's costs in markets where originating traffic is growing faster than terminating traffic. [250] In addition, they argue that AT&T has used its size to induce foreign telephone authorities to send AT&T a larger portion of highly profitable return traffic than it would ordinarily be entitled to.[251] Finally, they claim that AT&T derives market power from its control of excess capacity in most undersea cables. [252]

160. DOJ suggests that each country-pair represents a separate geographic market, and that the Commission should accordingly assess IMTS competition on a country-pair by countrypair basis. It does not, however, address which country-pairs are sufficiently competitive to warrant streamlined regulation and which are not. [253]

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[240] CNS claims that 25 percent of the calls routed to it cannot be completed due to the unavailability of billing and collection or validation data from a LEC. CNS states that it must not only hand over this traffic to AT&T, but also incur an average of $1.32 in costs in handling each such call. CNS Comments at 16-17. According to CompTel, the wide disparities in LEC rates for validation data suggest that these rates are not cost-based. CompTel Reply at 74, n. 160.

[241] A "0-" call occurs when the customer dials only the "0" digit and then waits for operator assistance. According to some operator service providers, BOC or GTE operators in most locations complete 0-calls only to AT&T regardless of which carrier is presubscribed to the originating line. They claim that while some LECs have implemented 0- transfer plans, these plans normally require IXCs to purchase costly trunking facilities which are uneconomical for virtually all IXCs other than AT&T.

[242] Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-35, adopted July 11, 1991.

[243] 5 FCC Rcd at 2636.

[244] AT&T Comments at 45-46; API Comments at 19-21, Reply at 20-22; SDN Users Reply at para. 4.

[245] AT&T Comments at 45-46.

[246] Id. at 44.

[247] API Comments at 19-20. API's assertions are based on an informal survey conducted by API.

[248] SDN Reply at para. 4.

[249] Sprint states that it serves only 39 countries directly, while MCI states that it serves 78. *Ex parte* letter from Lesla Lehtonen, Federal Regulatory Attorney, US Sprint, to Donna Searcy, Secretary, FCC, March 8, 1991; *ex parte* letter from Leonard S. Sawicki, Senior Manager, Regulatory Affairs, MCI Communications Corporation, to Andre Lachance, Attorney, Policy and Program Planning Division, FCC, October 19, 1990.

[250] CompTel Comments at 81-85; MCI Comments at 40-44; TRT Reply at 1-3; Hawaii Reply at 5-6.

[251] MCI Comments at 39-46. *See also* TRT Comments at 3.

[252] Sprint Comments at 24-25, Reply at 87; MCI Comments at 46-47, Reply at 32-33; TRT Comments at 4.

[253] DOJ Reply at 57-61.

(iii) Discussion

161. We find that there is not enough evidence in the record at this time on which to draw definitive conclusions about the competitiveness of IMTS. Recently, we adopted rules and issued a Further Notice of Proposed Rulemaking in a proceeding designed to promote lower international accounting rates and to prevent foreign entities from offering lower accounting rates on a discriminatory basis to certain U.S. carriers. [254] These proceedings may provide additional information about the state of competition for IMTS. Pending receipt of this information, however, we cannot reach definitive conclusions on this matter.

(c) Regulatory Treatment of Basket 1 Services

(i) The Notice

162. The Notice tentatively concluded that we should retain price cap regulation for all services in AT&T's Residential and Small Business Services Basket (Basket 1), including Basket 1 operator services and IMTS, as well as AT&T's MTS and ReachOut America services. In particular, we stated that streamlining of operator services should be implemented when barriers to operator services competition had been removed. We asked whether streamlining of IMTS might be appropriate as of January 1, 1993. Finally, we tentatively concluded that we should defer consideration of any changes in our regulation of MTS and ReachOut America services pending our review in 1992 and 1993 of AT&T's experience under price cap regulation.

(ii) Positions of the Parties

163. Most parties advocate the retention of price cap regulation for AT&T's Basket 1 operator services and IMTS pending the elimination of any remaining barriers to competition in these services. Few parties support the establishment of a target date for streamlined regulation of IMTS. There is also broad consensus that MTS and ReachOut America should remain subject to price cap regulation for now.

164. AT&T, API, and the SDN Users Association ask us to extend streamlining to all of AT&T's services. [255] AT&T asks, in the alternative, that we apply maximum streamlined regulation to rate decreases for operator services and ReachOut America service.

(iii) Discussion

165. Based upon our finding that there are unresolved issues and insufficient information in the record about the competitiveness of Basket 1 operator services and IMTS, we decline to adopt regulatory changes for these services at this time. [256] We also decline to establish a future date for IMTS streamlining, as was suggested in the Notice. Moreover, although it appears that residential and small business services are becoming increasingly competitive, we believe that we should proceed with particular caution with respect to these services. We therefore retain price cap regulation for Basket 1 residential and small business services as well. Finally, we preclude AT&T from including Basket 1 services in contract-based tariffs.

C. Rules Governing AT&T's Provision of CPE and Enhanced Services

166. The Notice also proposed certain changes in our rules governing AT&T's provision of CPE and enhanced services. In particular, we proposed to modify some of the nonstructural safeguards and comparably efficient interconnection (CEI) requirements established in the *AT&T Structural Relief Order* [257] and the *Computer III Inquiry*. [258] We noted that these requirements were based on AT&T's market power at that time in the provision of network services, and we tentatively concluded, in light of the apparent growth of competition in the longdistance market, that some of these requirements were no longer necessary or appropriate. We also sought comment on whether changes should be made in our policies precluding carriers from bundling CPE with network services or in our network disclosure requirements applicable to AT&T.

(1) Nondiscrimination Reporting Requirements and Annual Audit

167. One of the nonstructural safeguards established in the *AT&T Structural Relief Order* is the requirement that AT&T refrain from discriminating against customers with non-AT&T CPE in its provision of network services. To monitor AT&T's compliance with this safeguard, the Commission required AT&T to file quarterly reports comparing the timeliness with which it provided installation and maintenance of basic services to customers with AT&T CPE and to customers with other vendors' CPE. The Commission also required AT&T to submit its installation and maintenance procedures to an annual audit by an independent accounting firm and to file each audit report with the Commission. In the *Computer III* proceed-

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[254] Report and Order, Regulation of International Accounting Rates, CC Docket No. 90-337 (adopted May 9, 1991); Further Notice of Proposed Rulemaking, Regulation of International Accounting Rates, CC Docket No. 90337 (adopted May 9, 1991).

[255] AT&T Comments at 49-52; API Comments at 7; SDN Users Reply at para. 5.

[256] Moreover, Cable & Wireless has filed a petition asking for streamlined regulation for foreign owned carriers operating in the United States. Petition For Rulemaking to Modify the Commission's Regulation of International Common Carrier Services Provided by Foreign Owned U.S. Common Carriers, RM-7578 (filed December 3, 1990). The Cable & Wireless proceeding may provide further information about the public policy implications of streamlining AT&T's IMTS.

[257] Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Co., 102 FCC 2d 655 (1985), *modified in part on recon.*, 104 FCC 2d 739 (1986).

[258] Nondiscrimination reporting requirements for AT&T's enhanced services were established in the *Computer III* proceeding. Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 FCC 2d 958 (1986) (*Phase I Order*) *modified on recon.*, 2 FCC Rcd 3035 (1987), *aff'd on further recon.*, 3 FCC Rcd 1135 (1988). *See also* Report and Order, 2 FCC Rcd 3072 (*Phase II Order*) , *modified on recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Recon Order*) . The AT&T Structural Relief Order and Computer III proceeding established new regulatory frameworks governing AT&T's provision of CPE and enhanced services. Prior to these orders, AT&T could only provide CPE and enhanced services through a fully separate subsidiary. The *AT&T Structural Relief Order* and *Computer III* replaced these separate subsidiary requirements with "nonstructural safeguards" for CPE and enhanced services, respectively.

ing, the Commission adopted essentially these same nondiscrimination reporting requirements as a condition for AT&T's provision of enhanced services on an integrated basis.

168. The Notice tentatively concluded that we should eliminate the nondiscrimination reporting requirement for network services subject to maximum streamlined regulation. We also proposed to eliminate the annual audit requirement. We stated that since the interexchange marketplace is increasingly competitive and business services appear to be robustly competitive, it appeared that AT&T no longer had the incentive or ability to discriminate against competing CPE vendors or enhanced service providers (ESPs) in the provision of business services.

169. ADAPSO, IDCMA, NATA, Ad Hoc, and NTIA oppose these proposed changes. [259] ADAPSO, IDCMA, NATA, and Ad Hoc argue that AT&T still maintains the ability to discriminate in favor of its own CPE customers and that the nondiscrimination reporting and audit requirements remain necessary to ensure that this does not occur. [260] They state, further, that the nondiscrimination reports are an efficient supplement to the complaint process because these reports provide data that can be used to: (1) substantiate a complaint in the event that discrimination has occurred; and (2) reveal that discrimination has not occurred, thereby deterring frivolous complaints. NTIA states that nondiscrimination reporting and audit requirements should be retained because they are not particularly burdensome.

170. DOJ supports elimination of the nondiscrimination reporting requirements for services subject to maximum streamlining. [261] It states that "elimination of these requirements will not adversely affect competition in the markets for CPE and enhanced services," particularly in light of the general nondiscrimination provisions of the Act. AT&T argues that the nondiscrimination reporting requirements and the audit requirement should be eliminated completely. It contends that intense competition in all segments of the long-distance market has rendered these requirements superfluous. It asserts, further, that it would be irrational and self-defeating for it to engage in discrimination in its installation and maintenance procedures, because that would drive network service customers to competing IXCs. It maintains that it is simply not plausible that it would jeopardize substantial amounts of basic service revenues in order to gain an advantage in the much smaller CPE and enhanced services marketplaces. In addition, it states that the expense of compliance with these requirements is not insignificant.

171. We now affirm our tentative conclusions in the Notice and eliminate the nondiscrimination reporting requirements for services subject to further streamlined regulation as well the audit requirement. We have found that there is effective competition among IXCs in most business services. In light of this finding, current audit and nondiscrimination reporting requirements no longer appear to be necessary.

172. As discussed in the Notice, the installation and maintenance reporting requirements and the audit requirement were premised on the Commission's concern that AT&T would be able to use its market power in the provision of network services to compete unfairly in the CPE or enhanced services marketplace. In most of today's business services marketplace, however, AT&T cannot discriminate against particular customers unless it is prepared to lose those customers to other IXCs. This is true not only with respect to AT&T's installation and maintenance of business services, but to all facets of these service offerings. There is no need, therefore, for us to continue requiring AT&T to file nondiscrimination reports for most of its business services.

173. Nor is there a continued need for AT&T's annual installation and maintenance procedures audits. While competition is more vigorous for business services, AT&T faces increasing competition throughout the marketplace, even in services for which we do not adopt further streamlining at this time. This competition will help to ensure that AT&T provides nondiscriminatory installation and maintenance services for all of its network offerings. Moreover, we are retaining nondiscrimination reporting requirements for all services not subject to further streamlining. To retain audits as well would result in a "belts and suspenders" approach that is not necessary. Under the circumstances, we find that the annual audit requirement is unnecessary and should be eliminated.

174. IDCMA claims that an earlier AT&T audit revealed that AT&T's circuit assignment procedures are not fully mechanized. This same audit, however, reported "no matters came to our attention that AT&T was not in compliance with [its nondiscrimination] plan." Nor has IDCMA identified a single case of discrimination by AT&T in the five years in which this plan has been in effect.

175. NTIA claims that we should retain the nondiscrimination and audit requirements because they are not especially burdensome. Nevertheless, these requirements are not costless, and we do not believe that we should generally retain unnecessary regulations simply because the burdens they impose are limited. As noted, we are retaining nondiscrimination reporting requirements for services not subject to further streamlining although there is increasing competition for most, if not all of these services. In addition, any customer that has reason to believe that AT&T is discriminating in its provision of installation or maintenance of basic network services may file a complaint under the general nondiscrimination provision of the Act, which precludes unreasonable discrimination. The reporting requirements we retain, coupled with the general nondiscrimination provisions of the Act, will be more than sufficient to ensure the continued availability of nondiscriminatory installation and maintenance service from AT&T.

(2) Comparably Efficient Interconnection (CEI) Requirements

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[259] ADAPSO Comments at 6; IDCMA Comments at 76-79; NATA Comments at 2829; Ad Hoc Comments at 56-60; NTIA Reply at 31-32. ICA supports elimination of the annual audit requirement, but favors retention of nondiscrimination reporting requirements. ICA Comments at 19-20.

[260] According to IDCMA, AT&T's annual audit revealed that AT&T's circuit assignment procedures were not fully automated and that employees had some discretion in choosing specific facilities for customers. IDCMA Comments at 80, note 121.

[261] DOJ does not address the audit requirement.

176. The *Computer III* proceeding also imposed CEI requirements on AT&T that preclude AT&T from offering a specific enhanced service or class of services until it has submitted, and received approval of, a service-specific CEI plan. In each plan, AT&T must demonstrate that it will provide interconnection opportunities to other ESPs on an "equal access" basis. [262] This "equal access" standard applies to CEI parameters concerning: interface functionality; unbundling of basic services; resale; technical characteristics; installation, maintenance, and repair; end-user access; CEI availability (when and to whom); and minimization of transmission costs. [263]

177. The Notice tentatively concluded that we should eliminate application of these requirements to basic network services that are subject to maximum streamlined regulation. Specifically, it proposed to relieve AT&T of the obligation to obtain advance approval of a CEI plan prior to introducing a new enhanced service if the network components of that enhanced service are services subject to maximum streamlined regulation. [264] It sought comment on whether this proposal goes "too far or not far enough in eliminating wasteful and costly regulation." [265]

178. Several parties oppose the Commission's proposal to eliminate the CEI requirements. [266] They argue that current CEI filing requirements are not onerous and serve an important purpose in ensuring that the network access enjoyed by AT&T's enhanced service operations is comparable to that enjoyed by other enhanced service providers.

179. AT&T, DOJ, and NTIA support our tentative decision to eliminate CEI filing requirements for enhanced services using network components subject to maximum streamlined regulation. They argue that the growth of competition for business services has rendered these requirements unnecessary. AT&T and NTIA argue, further, that the CEI filing requirement imposes both opportunity costs -- including unnecessary delays in the introduction of enhanced services -- and direct costs on AT&T that are passed on to consumers. AT&T also claims that CEI filing requirements reduce its incentive to develop new enhanced services by forcing it to provide advance public notice of these offerings to its competitors.

180. While supporting the proposal to eliminate CEI filing requirements for enhanced services using network components subject to maximum streamlined regulation, AT&T states that this proposal does not go far enough. It asserts that enhanced services generally utilize a variety of basic services, including Basket 1 and Basket 2 services. It states that limiting relief to enhanced services using only maximum streamlined basic services would leave many enhanced services still subject to the filing requirements. Because all basic services are substantially competitive, it states, we should eliminate CEI filing requirements for all enhanced services.

181. AT&T states, further, that we should eliminate the CEI parameters as well as the CEI plan filing requirement. It states that these parameters deny customers some of the very economic efficiencies that the *Computer III* proceeding was intended to foster. NTIA favors retention of the CEI parameters.

182. We now eliminate the CEI requirements for enhanced services that rely exclusively on basic services subject to further streamlined regulation. Given the demonstrated competitiveness of AT&T's business services, the CEI requirements are no longer necessary to ensure that AT&T provides nondiscriminatory access to these services. Moreover, both the CEI filing requirement and the CEI parameters impose costs on consumers. The most important of these costs is delay in the availability of AT&T's enhanced services. Indeed, since the implementation of the CEI requirements, AT&T has filed six CEI plans and two requests for waiver of the CEI requirements. All but two of these filings were opposed by AT&T's competitors, and, consequently, the average interval from the filing of a CEI plan or waiver request to its approval grant - without change - was six months. These delays represent an inconvenient and unnecessary burden imposed on consumers of enhanced services. [267]

183. Substantial costs are also imposed by the CEI parameters. To comply with these parameters -- which apply only to AT&T and not other IXCs -- AT&T is often forced to engage in costly re-engineering of its network interfaces. In some cases, the costs of compliance are so high that AT&T is effectively forced to forego the integrated provision of the enhanced service involved. [268] CEI parameters thereby impede the realization of some of the efficiencies that *Computer III* was intended to foster. Given the competitiveness of business services today, this is a price that need not be paid. We therefore eliminate the CEI parameters for enhanced services that rely exclusively on network components subject to further streamlined regulation.

184. We decline at this time to modify or eliminate the CEI requirements for enhanced services using nonstreamlined network components. While increased competition in the longdistance marketplace generally has lessened the ability of AT&T to discriminate in the provision of these services, we believe that a cautious approach, whereby we eliminate CEI requirements incrementally, starting only with the services for which they are most clearly unnecessary, would best serve the public interest at this time. Of course, any party that has reason to believe that it has received discriminatory access to AT&T's network services may file a complaint under the general nondiscrimination provisions of the Act, which preclude unreasonable discrimination by common carriers.

(3) CPE Bundling and Network Disclosure

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[262] *Phase I Order*, 104 FCC2d at 1035-36, para. 147.
[263] *Id.* at 1039-43.
[264] 5 FCC Rcd at 2647, para. 170.
[265] 5 FCC Rcd at 2648, para. 174.
[266] ADAPSO Comments at 11; Ad Hoc Comments at 40, 53-60; IDCMA Reply at 21, n. 29; IBM Comments at 14; ICA Comments at 20.
[267] There are also direct costs associated with the CEI plan approval process. *See* AT&T Comments at 94, note ***.
[268] AT&T cites subaccount billing for which the Commission waived its CEI requirements as an example of an enhanced service that could not be provided consistent with CEI parameters on an economically feasible basis. *See* AT&T Comments at 96, note **.

185. *Computer II* prohibits carriers from bundling CPE and transmission services. The Notice asked for comment on whether AT&T should be permitted to bundle CPE with: (a) interstate transmission services subject to maximum streamlining; (b) single customer offerings; and/or (c) promotional offerings. The Notice suggests that since the equipment market is intensely competitive and bundling would be limited to the most competitively provided transmission services or to short-term promotional offerings, these modifications of the bundling restrictions would not likely present any risk of anticompetitive behavior by AT&T. It also suggests that permitting bundling in these contexts might enable consumers willing to commit to the purchase of both equipment and services to obtain price discounts. On the other hand, the Notice states that bundling would be inappropriate if it would lead to anticompetitive results. [269]

186. The Notice also sought comment on whether network disclosure requirements established for AT&T in the *AT&T Structural Relief Order* and the *Computer III* proceeding should be modified. Pursuant to these requirements, AT&T must disclose technical information about a new or changed network service that affects the interconnection of CPE or enhanced services with its network. The Notice suggests since the long-distance marketplace is increasingly competitive, and since AT&T's obligations under the All Carrier Rule would remain intact, a relaxation of the network disclosure rules might allow AT&T to introduce new services without unnecessary delay or risk of harm to its CPE or enhanced services competitors.[270] On the other hand, the Notice states that modifying the network disclosure rules would be inappropriate if it were to cause undesirable effects in the CPE or enhanced services marketplace.

187. We find that the current bundling restrictions and network disclosure rules should be retained. The vast majority of commenters argue that a lifting of these restrictions would offer few, if any, consumer benefits not already available, while inhibiting competition in the affected market sectors. [271] In addition, some parties argue that permitting CPE bundling would undermine the United States' position in international trade negotiations. Some parties also claim that permitting bundling of CPE would violate the Act. [272] Although we are not convinced that eliminating the bundling restrictions or modifying our network disclosure rules would have the dramatic negative effects that some parties have alleged, we are convinced that the risk of an adverse effect upon competition or reduced consumer choice resulting from changes in these rules currently outweighs the potential benefits that the suggested changes offer. Therefore, we retain current CPE bundling restrictions and the network disclosure requirements.

IV. CONCLUSION

188. In this *Report and Order* we have found the markets for most services in Basket 3 under price cap regulation and services outside of price caps to be substantially competitive. In light of this conclusion, we adopt further streamlined regulation for all Basket 3 services, except analog private line services, and for most business services outside of price cap regulation. We also adopt a contract carriage policy which will benefit users by allowing AT&T greater freedom to negotiate services agreements that will address customers specific needs. Finally, we adopt certain modifications to our rules governing AT&T's provision of CPE and enhanced services. Specifically, we eliminate the nondiscrimination reporting requirements for services subject to further streamlining and we eliminate the annual audit requirement. We also eliminate the CEI filing requirements and CEI parameters for enhanced services that rely exclusively on basic services subject to further streamlining.

V. REGULATORY FLEXIBILITY ACT

189. In the Notice, we asserted that the proposals contained in this rulemaking proceeding apply to AT&T; therefore, we certified that the Regulatory Flexibility Act of 1980 (RFA) was inapplicable to this proceeding due to the lack of a significant economic impact on a substantial number of small business entities, as defined by section 601(3) of the RFA. Nevertheless, several parties argue that the Commission has violated the RFAby failing to perform an initial regulatory flexibility analysis. [273] They assert that the RFA requires a detailed flexibility analysis since the proposed rule will "impact", "burden" or "affect" a significant number of small business entities. We find that the commenters have misconstrued the RFA and relevant case authority. Section 605(b) of the RFA permits an agency to forego either an initial or final regulatory flexibility analysis "if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small business entities." [274] In addition, the United States Court of Appeals for the District of Columbia Circuit has held that an agency's obligation to prepare a flexibility analysis is limited to situations in which small business entities are directly subject to the proposed rule. [275] Therefore, we conclude that since the rule changes only apply to AT&T, the RFA requirements are inapplicable to this proceeding.

190. The Secretary shall send a copy of this Order, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the RFA. Pub. L. No. 96-354, 94 Stat. 1167, 5 U.S.C. § 601 *et seq.* (1981).

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[269] 5 FCC Rcd at 2646-2649.

[270] Some parties state that there is some confusion about the scope and applicability of the All Carrier Rule. We now clarify that the All Carrier Rule requires all carriers to disclose, reasonably in advance of implementation, information regarding any new service or change in the network. *See* 47 C.F.R. § 68.110(b). *See also* Computer II Reconsideration Order, 84 FCC 2d 50, 82-83 (1980).

[271] Ad Hoc Comments at 55-67; IBM Comments at 9-10, 12-14; ICA Comments at 19-23; IDCMA Comments at 29-50, 61-76; Integrated Network Corporation Reply at 6-7; Motorola Comments 1-13; NATA Comments at 20-26, 29-32; NTIA Reply at 32-34; Northern Telecom Reply at 3-8.

[272] Digital Comments at 10; MCI Comments at 115; NATA Comments at 10-19.

[273] ACTA Comments at 46-47; NTCA Comments at 13-15; SBA Comments at 2729.

[274] 5 U.S.C. Section 605(b).

[275] *Mid-Tex Electric Co-op, Inc. v. F.E.R.C.*, 773 F. 2d 327, 342-3 (D.C. Cir. 1985).

VI. ORDERING CLAUSES

191. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 1, 4,201-205 and 208 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 201-205, and 208, Part 61 of the Commission's Rules, 47 C.F.R. Part 61 IS AMENDED as set forth in Appendix B.

192. IT IS FURTHER ORDERED that the policies, rules and requirements set forth herein ARE ADOPTED.

193. IT IS FURTHER ORDERED that the Chief, Common Carrier Bureau is delegated authority to act upon matters pertaining to implementation of the policies, rules and requirements set forth herein.

194. IT IS FURTHER ORDERED that the Department of Justice's request that the Commission accept its September 28, 1990 reply comments under this docket is GRANTED.

195. IT IS FURTHER ORDERED that the provisions in this *Report and Order* will be effective 30 days after *Federal Register* publication.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

COMMENTS:

1. The Computer Software Service Industry Association, Inc. (ADAPSO)
2. Ad Hoc Telecommunications Users Committee (Ad Hoc)
3. Advanced Telecommunications Corp. (ATC)
4. Aeronautical Radio (ARINC)
5. Alascom, Inc. (Alascom)
6. State of Alaska (Alaska)
7. Americall Systems of Louisville & First Phone of New England, Inc. (Americall)
8. American Petroleum Institute (API)
9. American Public Communications Council (APCC)
10. America's Carrier Telecommunications Association (ACTA)
11. American Telephone & Telegraph Company (AT&T)
12. Arkansas Public Service Commission (Arkansas)
13. Bell Atlantic Telephone Companies (Bell Atlantic)
14. Cable & Wireless Communications, Inc. (Cable & Wireless)
15. California Public Utilities Commission (California)
16. The California Bankers Clearinghouse Association, The New York Bankers Clearinghouse Association and VISA U.S. A., Inc. (The Bank Coalition)
17. Call-America
18. Capital Cities/ABC Inc. /CBS Inc. /National Broadcasting Company (The Broadcast Coalition)
19. Capital Network System (CNS)
20. Chief Counsel for Advocacy of the United States Small Business Administration (SBA)
21. Communications Transmission, Inc. (CTI)
22. Competitive Telecommunications Association (Comptel)
23. Consumer Federation of America (CFA)
24. Contel Corporation (Contel)
25. Control Resources Corporation (Control Resources)
26. Digital Equipment Corporation (Digital)
27. District of Columbia Public Service Commission
28. Florida Public Service Commission (Florida)
29. Frederick & Warinner
30. General Communication, Inc. (GCI)
31. General DataComm Industries, Inc. (GDC)
32. GTE Telephone Operating Companies (GTE)
33. State of Hawaii (Hawaii)
34. Independent Data Communications Manufacturers Association, Inc. (IDCMA)
35. Intellicall, Inc. (Intellicall)
36. International Business Machines Corporation
37. International Communications Association (ICA)
38. International Telecharge, Inc. (ITI)
39. Nicholas Kottyan (on behalf of Phone America of Carolina, Inc.) (Phone America)
40. MCI Telecommunications Corporation (MCI)
41. Metromedia/ITT Long Distance (Metromedia)
42. Michigan Public Service Commission Staff (Michigan Staff)
43. MidAmerican Long Distance Company (MidAmerican)
44. Midco Communications, Inc. (Midco)
45. Motorola, Inc. (Motorola)
46. Multinational Business Services, Inc. (MBS)
47. National Telephone Cooperative Association (NTCA)
48. North American Telecommunications Association (NATA)
49. NYCOM Information Services (NYCOM)
50. New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)

51. Operator Services Providers of America, National Telephone Services, Inc., Operator Assistance Network, and U.S. Long Distance, Inc. (OSPA)

52. Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)

53. Pacific Bell and Nevada Bell (Pactel)

54. Pan American Satellite

55. Schneider Communications

56. Southern Pacific Telecommunications Company (SP Telecom)

57. Southwestern Bell Telephone Company (SWBT)

58. Tele-Communications Association (TCA)

59. Telesphere Communications, Inc. (Telesphere)

60. Total Tel USA

61. TRT/FTC Communications, Inc. and TRT International, Inc. (TRT)

62. U.S. Fibercom Network, Inc. (U.S. Fibercom)

63. US Sprint Communications Company Limited Partnership (Sprint)

64. United States Telephone Association (USTA)

65. Western Union Corporation (Western Union)

66. Williams Telecommunications Group, Inc. (WilTel)

REPLY COMMENTS:

1. Ad Hoc

2. ARINC

3. Alascom

4. API

5. APCC

6. AT&T

7. ACTA

8. Ameritech Operating Companies (Ameritech)

9. The Bank Coalition

10. California

11. The Broadcast Coalition

12. Capital Network System, Inc.

13. Chase Manhattan Corporation, Citicorp, Household International, Inc., MBNA America Bank, N. A., Norwest Card Services/Norwest Bank Iowa, National Association, and Security Pacific Corporation (Credit Card Companies)

14. Communications Satellite Corporation (COMSAT)

15. Communications Transmission, Inc. (CTI)

16. Comptel

17. CFA

18. Department of Justice (DOJ)

19. Digital

20. GCI

21. Hawaii

22. Illinois Commerce Commission (Illinois)

23. IDCMA

24. Integrated Network Corporation

25. ICA

26. ITI

27. Iowa State Utilities Board

28. MCI

29. Metromedia

30. Midamerican

31. MiTel, Inc. (MiTel)

32. National Data Corporation (NDC)

33. National Telecommunications and Information Administration (NTIA)

34. NTCA

35. NATA

36. Northern Telecom, Inc. (Northern Telecom)

37. Ohio Public Utilities Commission (Ohio)

38. OSPA

39. OPASTCO

40. Pactel

41. Pan American Satellite

42. Rochester Telephone

43. SDN Users Association (SDN Users)

44. SBA

45. SWBT

46. SRX Corporation

47. TCA

48. Telesphere

49. Tennessee Public Service Commission (Tennessee)

50. Texas Attorney General's Office (Texas)

51. TRT/TFC

52. U.S. Fibercom

53. Sprint

54. USTA

55. US West Communications, Inc. (US West)

APPENDIX B

Title 47 of the Code of Federal Regulations, Part 61, is amended as follows:

1. Section 61.3 is amended by redesignating subsections 61.3(m), 61.3(n), 61.3(o) 61.3(p), 61.3(q), 61.3(r), 61.3(s), 61.3(t), 61.3(u), 61.3(v), 61.3(w), 61.3(x), 61.3(y), 61.3(z), 61.3(aa), 61.3(bb), 61.3(cc), 61.3(dd), 61.3(ee), 61.3(ff), 61.3(gg), 61.3(hh), 61.3(ii), and 61.3(jj) as 61.3(n), 61.3(o) 61.3(p), 61.3(q), 61.3(r), 61.3(s), 61.3(t), 61.3(u), 61.3(v), 61.3(w), 61.3(x), 61.3(y), 61.3(z), 61.3(aa), 61.3(bb), 61.3(cc), 61.3(dd), 61.3(ee), 61.3(ff), 61.3(gg), 61.3(hh), 61.3(ii), 61.3(jj), and 61.3(kk), and adding subsection m as follows:

(m) *contract-based tariff.* A tariff based on a service contract entered into between an interexchange carrier subject to §§ 61.42(a) - (c) or a nondominant carrier and a customer.

2. Section 61.33(f) is amended by redesignating (f) as (f)(1) and adding subsection (f)(2) as follows:

(f)(1) * * *

(2) For contract-based tariffs defined in section 61.3(m), a separate letter of transmittal must accompany each tariff filed. The transmittals must be numbered in a series separate from transmittals for non-contract tariff filing. Numbers must appear on the face of the transmittaland be in the form of "CTT No. _____ ", using CTT as an abbreviation for contract-based tariff transmittals. Contract-based tariffs must also be numbered in a series separate from non-contract-based tariffs. Numbers must be in the form of "CT No. _____ ", using CT as an abbreviation for contract-based tariffs. Each contract-based tariff must be assigned a separate number. Transmittals and tariffs subject to this subsection shall be filed beginning with the number "1" and shall be numbered consecutively.

3. Section 61.38(a) is amended to read as follows:

(a) * * * This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings proposing rates for services identified in §§ 61.42 (a), (b), (d), (e), and (g), promotional offerings that relate to services subject to price cap regulation, or to tariff filings, other than promotional filings, filed on 14 days notice pursuant to § 61.58(c)(6).

4. Sections 61.41(c) and (d) are amended by revising references to § 61.3(v) to read § 61.3(w).

5. Section 61.42(b)(3) and (c) are amended to read as follows:

(b)(3) The business services basket shall contain analog private line offerings, including analog voice grade private line and terrestrial television transmission service.

(c) * * *

(1) Special construction services relating to services in section 61.42(b)(1), (b)(2), and (b)(3);

(2) All other special construction services;

(3) American Telephone and Telegraph Company Tariff F.C.C. No. 11 services;

(4) American Telephone and Telegraph Company Tariff F.C.C. No. 12 services;

(5) American Telephone and Telegraph Company Tariff F.C.C. No. 16 services;

(6) Services subject to below-the-line accounting;

(7) International private line and record carrier services;

(8) Contract-based tariffs;

(9) Services removed from price cap regulation pursuant to the Report and Order in Docket No. 90-132;

(10) Promotional offerings for services in section 61.42(b)(1), (b)(2) and (b)(3);

(11) All other promotional offerings;

(12) Custom tariff services; and

(13) Such other services as the Commission may specify.

6. Section 61.47(h) is amended by revising the reference to § 61.3(v) to read § 61.3(w).

7. Section 61.48(b) is amended by redesignating subsection (b) as (b)(1) and adding subsection (b)(2) as follows:

(b)(1) * * *

(b)(2) The PCI and API for offerings under section 61.42(b)(3) shall be assigned a value equal to 100, corresponding to rates in effect as of August 1, 1991. Dominant interexchange carriers subject to price cap regulation shall file new business basket index levels with the first business basket tariff transmittal that is filed subsequent to the effective date of this rule.

8. Part 61 is amended by the adding the following section:

§ 61.55 Contract-based tariffs.

(a) Scope. This section shall apply to offerings as defined in section 61.3(m).

(b) Composition of contract-based tariffs shall comply with section 61.54(b) through (i).

(c) Contract-based tariffs shall include the following:

(1) The term of the contract, including any renewal options;

(2) A brief description of each of the services provided under the contract;

(3) Minimum volume commitments for each service;

(4) The contract price for each service or services at the volume levels committed to by the customers;

(5) A general description of any volume discounts built into the contract rate structure; and

(6) A general description of other classifications, practices and regulations affecting the contract rate.

(d) Contract-based tariffs of an interexchange carrier subject to price cap regulation shall not include services included in §§ 61.42(b), 61.42(c)(1), (c)(4), and 61.42(c)(10).

9. Section 61.58(c) is amended by redesignating subsection (6) as subsection (7), adding subsection (6) and revising subsection (7) as follows:

(c)(6) Tariff filings involving services included in § 61.42(c), except for services included in §§ 61.42(c)(1), (c)(4), and (c)(10), must be made on at least 14 days notice.

(c)(7) The required notice for services included in §§ 61.42(c)(1), (c)(4), and (c)(10), tariff filings involving services included in § 61.42(f), or tariff filings involving changes in tariff regulations, other than tariff regulations for services described in subsection (c)(6), shall be that required in connection with such filings by dominant carriers that are not subject to price cap regulation.

Statement of FCC Chairman Alfred C. Sikes Regarding Actions to Promote Long-Distance Competition

In telecommunications, we have come a long way in a relatively short period of time. Litigation and judicial actions pried open the windows of a closed telecommuni-

cations world. The courts responded not only to the force of law but also to the entrepreneurial spirit demanding opportunity.

Now, nearly a generation after the initial procompetitive court action in the *Execunet* case, communications customers are saying it's time to more fully harvest the fruits of competition. They are saying to us, "Competition will reward us with lower prices and better service, if you get out of the way."

But, it's not just business customers who are talking about the fruits of long-distance competition. Those of us whose decisions influence the strength of our communications networks are also talking about the benefits of competition. We are talking about thousands of miles of fiber, tens of thousands of digital circuits, and advanced switching that the long-distance carriers now provide. We are talking about the core assets of an advanced "Information Age," and the extraordinary contribution long-distance competition has made.

Today, the FCC is taking steps that will let long-distance customers enjoy more fully the fruits of competition while constructing the framework for major strides in advancing further competitive strength.

The FCC is not taking a tentative step, or acting in a piecemeal fashion, unaware of the larger consequences of its work. We are acting comprehensively, and with a keen appreciation of the consequences of our regulatory revisions. And, as we have promised, our decisions express a comprehensive view of the long-distance marketplace. We relax our regulatory hold on those segments of the market that are effectively competitive while continuing to strengthen the opportunity to compete.

Our approach accomplishes three critical results. First, we reduce regulations on AT&T to permit the company to compete more vigorously with its rivals in the larger business segment of the market, and to let customers realize the benefits. We retain, however, our price cap structure for services that appear to be somewhat less competitive.

Second, we advance the Bell companies' and GTE's network modernization plans, to allow all long-distance companies to compete for the fast growing 800 number market. This network modernization will help speed the availability of more advanced services on a nationwide basis.

Third, we continue a single pricing arrangement for local exchange carriers' provision of the local transport link for long-distance calls. But we take the important first steps toward a rate structure that will allow consumers to benefit from scale economies and transport competition. Local competition, after all, will be stillborn if the underlying cost of providing telecommunications transport is distorted by government fiat.

We, therefore, propose today an "interconnection charge" plan and look forward to receiving comments on its implementation.

One of the challenges our nation faces in the 1990s is the need to make our services economy productive. Robert Samuelson in yesterday's *Washington Post* reviewed the dismal showing of our services sector during the 1980s. Services prices went up 67 percent more than the prices of manufactured goods during the last decade. Overall, the productivity gain in the services sector during the Eighties was a disappointing 0.2 percent. By contrast, manufacturing productivity averaged a gain of 3.5 percent a year.

Telecommunications services can make important direct and indirect contributions to services productivity. But telecommunications cannot do so if we don't work to permit the expansion of competition and the opportunity to deliver fully valuable economies of scale. The interconnection plan we propose will help us to accomplish those goals by transitionally giving each company the chance to better prepare for the future.

Finally, today's actions and the future actions they foreshadow have not been easily reached. This Commission has had to understand difficult accounting principles and applications within a complicated and, at times seemingly arbitrary, historical regulatory setting. And, understandably, there has been no lack of political pressure. I believe the Commission and its excellent staff have, however, not only conquered the complications but have also established a framework for a bright future.

Statement of
Commissioner James H. Quello
Dissenting in Part
August 1, 1991

In re: Competition in the Interstate Interexchange Marketplace, Docket No. 90-132

I believe that that the Commission has taken a step forward in adopting this Report and Order. But it is an unnecessarily tentative step.

The majority looks at the market for 800 services and sees "captive customers" and "leveraging" although the record fails to support such a vision. Thus, the majority will restrict AT&T's competitive efforts by prohibiting bundling of 800 services within competitive contracts.

While relying upon the fears and fantasies of various competitors, the majority has ignored the pleas of those for whom a competitive marketplace is supposed to benefit; the customers. Even as this country's industries are locked in a competitive struggle with their global counterparts, this Commission finds itself protecting the profits of a portion of the telecommunications industry at the expense of customers who rely upon that industry for a competitive edge. Not that all of these customers believe that a fully competitive AT&T is their choice to provide a range of vital telecommunications services. Many do not. They do believe, however, that handicapping the strongest competitor -- as the majority continues to prefer -- lessens competition and reduces their opportunities to leverage one competitor against another.

AT&T's competitors have made much of their claim that AT&T is engaged in leveraging their captive customers of 800 services to promote other bundled services. In a letter to the FCC General Counsel on July 12th, the AD Hoc Telecommunications Users Committee addresses the leveraging argument. Although referring specifically to TAriff 12 offerings, Ad Hoc's comments would appear to apply equally to the bundling of 800 services within contract offerings.

"U.S. Sprint has submitted detailed breakdowns of the pricing of over seventy VTNS options. If the competitors' 'leveraging' argument were correct, it is highly likely that patterns would appear in the pricing of these options

correlating with the respective proportions of inbound traffic in the options. Surprisingly, neither U.S. Sprint nor any other proponent of the 'leveraging' theory analyzed the data to determine whether such patterns exist. Perhaps this was because of what such an analysis reveals: none of the patterns which might be predicted by the 'leveraging' theory are in fact present in the data. This is shown by an exhaustive analysis conducted by Economics and Technology, Inc. (ETI), and provided in this record as Attachment A to the Reply Comments on Tariff 12 Issues on Remand of The Ad Hoc Telecommunications Users Committee and Other Specified Users. That analysis -- which stands undisputed in the record -- shows unequivocally that none of the pricing behaviors that could plausibly have been predicted to result from unfair leveraging has occurred. AT&T's *competitors have provided no analysis of these or any other data which would lead to a contrary conclusion.*" (Emphasis in the original.)

Absent any shred of evidence in the record as to where leveraging has occurred, the majority must be content to speculate that such anti-competitive activity "might" occur or "could" occur. the price of such speculation must be paid by the customers who could and should benefit from full and fair competition.

I support this Report and Order as a step toward a competitive telecommunications marketplace, albeit a tentative one. Where it fails to recognize the competitive reality of the 800 services market, I dissent.

Statement of
Commissioner Sherrie P. Marshall

Re: Competition in the Interexchange Marketplace (CC Docket No. 90-132)

Today's action marks a significant, yet careful, step toward a fully competitive interexchange marketplace. It is significant because we are substantially deregulating AT&T's service offerings to large business users. It is careful, because even in lifting the constraints on particular business offerings, we are retaining restrictions in those areas -- such as international and operator services -- where the historical vestiges of AT&T's monopoly still exist.

Competition for business services has been increasing. Business users may now select from a wide variety of competitors vying to provide their long distance needs. In the face of this competition, and the increasingly sophisticated demands of high volume business users, there exists no reason why AT&T should be foreclosed from offering contract rates to large users. Indeed, allowing AT&T to offer the same type of integrated service packages to large business users that its competitors do will provide *more*, not less, competition.

At the same time, AT&T is still the dominant carrier. Thus, it must continue to file its contract tariffs with the Commission before those offerings become effective. Moreover, consistent with the nondiscrimination requirements of the Act, those offerings must be generally available to similarly situated customers. These issues are self evident.

I am more troubled, however, by the question of whether to allow bundling of 800 services with contract packages or Tariff 12s. On the one hand, AT&T clearly has an historical advantage due to its early entry into 800 services and current network configurations which preclude 800 number "portability". On the other hand, this advantage is not due to the exercise of anticompetitive conduct by AT&T, and, at first blush, it could be viewed as draconian to preclude AT&T from including such services when competing for large business contracts.

Nevertheless, after extensive analysis, I have determined that the advantage AT&T still has as a result of its prior entry into the 800 services market represents a substantial impediment to the ability of other carriers to compete on an equal footing with AT&T. Accordingly, I support the prohibition against the bundling of 800 services in contract-based tariffs. I realize this restriction may put AT&T at a slight competitive disadvantage for the next 18 months, but that handicap will be temporary and is certainly no greater than necessary to create a fair, fully competitive business services marketplace for the long run. Indeed, as soon as 800 portability is achieved, the Commission has stated that it will permit AT&T to bundle its 800 services with outbound traffic.

Of course, a number of Tariff 12s with bundled 800 services already have been allowed to go into effect. In my view, it would be unfair to force those consumers to dismantle the integrated service packages in which they have already invested. Accordingly, it is fully appropriate for the Commission to grandfather the bundling of 800 services in those packages. And, consistent with the general availability requirement applicable to contract carriage, to allow similarly situated customers to continue to obtain those exact same offerings.

Finally, the Commission's decision today should in no way be read as an attempt to gerrymander the interexchange marketplace. Rather, it represents a recognition that in most respects, the market for large business long distance services is increasingly competitive, and that all competitors should have the flexibility to meet that competition.

Separate Statement of
Commissioner Andrew C. Barrett

In Re: Competition in the Interstate Interexchange Marketplace (CC Docket No. 90-132).

At the outset of this proceeding, I emphasized that the Commission must consider the entire interstate interexchange (IXC) marketplace, and not focus exclusively on the level of competition between AT&T, MCI and U.S. Sprint. I have warned that if we talk simply in terms of dominance, the Commission will fail to address major competitive concerns in the marketplace. We must not only consider the impact on the large users, but also examine the impact on smaller business customers and residential users. Consistent with the goals of "genuine" competition in the interexchange marketplace, my approach has been a cautious streamlining of AT&T. I believe that today's decision is a reasoned reaction to this Commission's view of the marketplace. It is a decision born of numerous discussions and debates among colleagues with different policy objectives. The changes in this Order should benefit customers and the public. The door is opened slowly, however, so that we retain the ability to monitor any abuse of market power.

In markets where there is a level of competition, AT&T should be given greater regulatory freedom. Other markets, such as the 800 services market, require retention of

some restraints. We have attempted to establish a delicate balance of regulatory restraints to address these two concerns. Upon reviewing the record in this proceeding, we have decided not to go too fast in our streamlining of AT&T. Over the short term I do not doubt that customers would benefit from maximum streamlining of AT&T. Our goal at the Commission, however, is not to simply make policy decisions based on short term gains. As a Commissioner, I must consider the long term impact of our decisions. Upon examination of the record and the current interexchange marketplace, I am convinced that AT&T still retains a dominant position in the marketplace. Thus, I believe AT&T has the ability to act anticompetitively to the detriment of other carriers. Accordingly, the relief I vote for is a measured approach at streamlining.

Under the rules adopted today, AT&T will be able to respond to the desires of large customers to develop individualized contracts that serve customer needs. AT&T will be permitted to file changes in its rates and other tariff provisions, effective on fourteen day notice without cost support. The fourteen day review provides more time for public review of these filings; which gives the Commission the ability to closely scrutinize these filings, where necessary. Current marketplace realities support these changes.

These same marketplace realities cause the Commission to not adopt maximum streamlining for AT&T's Baskets 1 and 2. In addition, we determine that AT&T should not be allowed to bundle 800 services or customer premises equipment (CPE). Our prohibition on 800 services bundling is a recognition that the lack of number portability restrains competition in this market. Our prohibition on bundling, however, is temporary. Once 800 number portability becomes a reality, there will be no need for this restraint. [276] In the interim, customers should not be adversely disadvantaged since they will be able to purchase 800 service under tariff rates. This scheme may cause short term inconveniences, but it is designed to address our policy objectives of long term competition in this market.

As a final note, I do not support adoption of these changes without some apprehension. My concern is for the smaller and mid-sized IXCs. I understand that these carriers are currently unable to compete for most of the national interexchange telecommunications business offered by the larger business companies of Basket 3. Nonetheless, many of these smaller IXCs provide a portion of the interexchange service purchased by larger business customers, or provide niche services to both large and small business customers. For the sake of competition, I am hopeful that this continues to be the case. I plan to keep a careful watch over the business service market to ensure that genuine competition is a reality.

Separate Statement of Commissioner Ervin S. Duggan

In Re: Competition in the Interstate Interexchange Marketplace (CC Docket No. 90-132).

I have on occasion publicly expressed skepticism about the danger of moving too quickly to deregulate AT&T. Specifically, I have warned against confusing potential competition in the long-distance market with actual competition. Yet today I find myself supporting the steps we take. Why? Because I see them as measured, incremental responses to actual marketplace changes.

The Commission today pointedly declines to adopt some of the more far-reaching proposals contemplated in its original notice. We are not, for example, declaring AT&T to be nondominant. We are not permitting AT&T to enter into private carriage. We have found the business services market to be substantially competitive -- but not perfectly so.

Our approach to contract carriage and to streamlined regulation is similarly cautious and incremental. Contracts must be generally available. They are subject to 14-days' notice -- not one day's notice as originally contemplated. The Commission has put limits on the bundling of 800 services. I therefore support the Commission's actions today, which not only acknowledge a more competitive market for interstate business communications services, but should promote even more competition.

Contract Carriage

I share the view that offering service to the public under rates, terms and conditions negotiated between a carrier and its customers is lawful under the Communications Act. I am persuaded, after much consideration, that contract carriage will allow AT&T to do business in the way that its competitors already do. The benefits that customers negotiate will flow to other customers because the Commission insists in this proceeding that such offerings must be generally available.

Let me mention some important features of today's action.

First, and crucially in my judgment, AT&T's contract offerings must be generally available to all similarly situated customers. If contracts are in fact generally available, contract carriage will not be merely a device to encourage unreasonable discrimination in defiance of Section 202(a) of the Communications Act. By forbidding the restriction of contract price reductions to a single customer or to narrow classes of customers or market segments, the Commission encourages a positive development: the propagation of rate reductions and service improvements to more and more customers. [277]

Second, the 14-day notice period for tariff filings. A 14-day notice period will allow the Commission to detect and act appropriately on tariffs that may be anticompetitive or contrary to the public interest. In my view, these would include contracts that are not truly

[276] I fully support our actions today in establishing a time table of eighteen months for number portability. *See* Report and Order in CC Docket No. 86-10, adopted August 1, 1991.

[277] I think it unlikely that the doctrine of "competitive necessity" or "competitive circumstances and conditions" could be used to justify AT&T's denial of the general availability of any of its contract offerings, given the competitive condition of the business services marketplace. Of course, because these tests must be applied on a case-by-case basis, I cannot rule out such a justification before seeing the facts of any particular case.

"generally available" -- contracts limited geographically, for example, or restricting resale, or effectively limited to a single customer. Yet 14-days' notice, in our judgment, will allow contract customers to receive the benefit of price reductions and service improvements promptly.

Third, we have prohibited bundling 800 services in contracts until 800 number portability has been achieved. AT&T's continued dominant share of the 800 market, coupled with the lack of number portability, has led the Commission to conclude that the 800 services market is not yet fully competitive. Prohibiting bundling of 800 service with other, more competitive, services should reduce the danger that AT&T will use the vestigial remains of its former monopoly status to coerce its customers or to limit fair competition.

Elimination of Basket Three Price Caps

I also support the lifting of price cap regulation on Basket 3 business services -- a significant step. Henceforth, these interexchange carrier rates will not be set by regulation: they will be guided, instead, by the interplay of competitive rivalry. Carriers will still be subject to the requirements of the Communications Act that they must offer service at just and reasonable rates and without unreasonable discrimination. Questions about the lawfulness of AT&T's rates will, for the most part, be settled through the complaint process and through the Commission's tariff investigations.

Conclusion

In short, if our judgment in this proceeding proves correct, the nation's interstate long-distance customers will see more vigorous competition, lower rates, increased innovation, and better service. I believe that AT&T's competitors will thrive in this more vigorous market, and that customers will benefit.

No one in this long and complicated proceeding has denied that the interexchange market has become more competitive in recent years, or that customers are demanding new services and concessions more clamorously than ever. In the face of such changes, we cannot maintain a permanent regulatory *status quo*. We must find out if unfettered competition will work. Like my colleagues, I hope that it will: that our actions today will yield ever-lower prices and better service for business customers, and that we will see increasingly intense competition in the telecommunications market.

The stance of cautious incrementalism that we strike today is right also for the future. We have not yet reached the point at which we as regulators can simply walk away. AT&T still enjoys a substantial share of this market and of the rest of the interexchange market. We must, therefore, be vigilant. We must ensure that our actions do in fact promote what the public interest and the law require: communications services at just, reasonable, and nondiscriminatory rates.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 86-285

In the Matter of

Establishment of a Fee
Collection Program to
Implement the Provisions
of the Omnibus Budget
Reconciliation Act of 1989

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 1991; Released: October 10, 1991

By the Commission:

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1. Before the Commission are Petitions for Reconsideration, Partial Reconsideration and/or Clarification of *Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, (Fees II)*, 5 FCC Rcd 3558 (1990), implementing section 3001 of the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 101 Stat. 2106, codified at 47 U.S.C. § 158 (1989) (the 1989 Budget Act).[1]

2. The Commission's current fee program was originally mandated by the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82, 118-121 (the 1985 Budget Act), and implemented by the Commission in *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, (Fees I)*, 2 FCC Rcd 947, *recon. granted in part*, 3 FCC Rcd 5987 (1988) (*Fees I Reconsideration Order*). The 1989 Budget Act increased the amount of the fees to be charged by the Commission and created new fees for other regulatory services or filings. *See Fees II*, 5 FCC Rcd at 3560-61.[2] Petitioners raise issues concerning the implementation of the 1989 Budget Act without notice and comment Rule Making, the fee filing procedures adopted in *Fees II*, and the applicability of specific fees.

I. IMPLEMENTATION OF FEES II

3. In *Fees II*, we explained that implementation of the new fees would require some adjustments in the manner in which the Commission collected the fees. We concluded that because "[t]hose changes, however, involve rules 'of agency organization, procedure, or practice,' . . . a notice and comment Rule Making is not required before they are put into effect. 5 U.S.C. § 553(b)(A)." 5 FCC Rcd at 3559, note 3. Two Petitioners, R&H and FCBA, argue that we should have engaged in a notice and comment Rule Making before implementing new fee collection procedures.

4. As indicated in *Fees II*, although we originally intended to seek comment on proposed implementing regulations, the decision to proceed directly to the adoption of implementing rules, without benefit of notice and comment Rule Making, was driven by two important factors: 1) a strongly stated congressional intention that the new fees be implemented within 150 days of enactment of the 1989 Budget Act; [3] and 2) a desire to achieve a smooth transition to the new fee amounts and procedures by giving the public sufficient advance notice of the changeover. In satisfying the 150 day deadline, we found that it was simply not "possible to both afford an opportunity for public comment and give the public advance notice of the new rules." 5 FCC Rcd at 3559. Because the legislative history of the 1989 Budget Act had also suggested that we avoid a "full-blown" Rule Making prior to implementing these charges,[4] we concluded that the best

resolution was to proceed directly to adoption of new rules. 5 FCC Rcd at 3559. In so doing, we strongly emphasized that "any party will have the opportunity to seek reconsideration of any particular procedure" and that any such petitions will be reviewed carefully "to determine if any matters raised by comments require an adjustment of these new rules." *Id.* at 3559-60. Consistent with this statement, and although we continue to believe that notice and comment proceedings were not required prior to the adoption of the new fee procedures,[5] we have given full and careful consideration to the petitions for reconsideration to assess whether adjustments should be made to the new rules. Hence, we believe that the public has been afforded a complete and fair opportunity to comment on the new procedures.

5. As to the FCBA's claim that we provided inadequate explanation and information in *Fees II*, we think the Commission's *Order* provided a full and reasonable explanation for the rules. *See, e.g.*, paras. 12, 13 and note 14, 14 and 15. Moreover, to the extent the reconsideration petitions indicate that further explanation is warranted, we discuss more fully below the reasons for the procedures and for our rejection of alternative options.

II. FEE FILING PROCEDURES

A. The Use of a Lockbox Bank

6. *Fees II* determined that all fee filings would be submitted to the Commission through a lock-box bank, the Mellon Bank in Pittsburgh, Pennsylvania. Some Petitioners take issue with the use of a lock-box bank, arguing that the Commission could and should accept and process all fee submissions itself. Petitioners also suggest a variety of other filing schemes, namely: 1) a "split filing" system in which fee payments are made to the bank and applications and other feeable filings are submitted directly to the Commission; 2) the use of a lock-box bank in Philadelphia rather than Pittsburgh; and 3) the establishment and use of a lock-box bank in Washington, D.C.[6]

7. R&H maintains that the Commission's record is inadequate to demonstrate that the in-house receipt process could not be improved. R&H and FCBA suggest that the Commission could recruit, hire and train capable staff to perform basic governmental functions in the District of Columbia, improve management practices, and increase employee salaries or hire additional staff for the Fee section located in Commission Headquarters. Because Pittsburgh filings are sent back to Washington by overnight courier, the FCBA maintains that the overall costs associated with the daily overnight deliveries are greater than the cost of hiring additional employees for the Commission's fee program. In addition, Petitioners argue that the Commission failed to consider whether the Bureaus could handle fees as part of their normal processing functions, thereby eliminating the need for a separate Fees Section. Alternatively, the FCBA suggests that the Commission failed to consider whether an extra copy submitted with every fee filing would expedite the Commission's processes by permitting the Fee Section to give the filing an identifying number and forward the copy to the Bureau for action while the Fee Section conducts its review.

8. The FCBA suggests that both feeable and non-feeable submissions should continue to be filed with the Commission's principal office in Washington, D.C. because changing the filing location is inconsistent with the requirement that the Commission handle its principal functions in Washington.[7] Similarly, R&H argue that section 8 (f) of the Communications Act and Treasury Department "cash management laws" must be read in harmony with the requirement that the Commission maintain its principal offices in the District. R&H contend that Congress neither required nor anticipated that the fees proceeding would be used to reorganize entirely the Commission's application filing procedures and locations. In addition, the FCBA emphasizes that most law firms and companies doing business with the FCC are located in Washington, and such parties should have the ability to submit documents directly to the agency at its principal office. Kaye, Scholer notes that other federal agencies which also charge filing fees such as the Patent & Trademark Office, the Copyright Office and the Securities and Exchange Commission, collect filing fees in their principal offices in the District of Columbia and should serve as a model for the Commission's own practice. NTCA and Blooston, Mordkofsky argue that the Commission's decision to move application processing to Pittsburgh creates added burdens on small companies.[8]

9. Prior to *Fees II*, all Private Radio and some Mass Media and Common Carrier applications subject to fees were filed through the lockbox bank in Pittsburgh, while the remaining applications were processed at the Commission's Fee Office in Washington. However, fee processing in Washington resulted in significant delays in forwarding applications to the processing offices and bureaus. Because the 1989 Budget Act would almost triple the number of applications subject to fees filed annually with the FCC, we therefore determined that all applications subject to fees should be filed with the Commission through the Mellon Bank. We of course agree with the commenters who observe that expedited fee processing could be accomplished in Washington, D.C. by hiring more and better paid people to accomplish that task. However, pay rates and classifications are established by the Office of Personal Management, and, even assuming *arguendo* that the Commission could increase the pay of persons working in the Fee Section, the FCC's very tight budget constraints preclude the kinds of staff increases that would be necessary to expeditiously process fee submissions in Washington.[9]

10. On the other hand, the Department of the Treasury lockbox bank program offers a means to accomplish fee processing without significant delays in the substantive processing of applications virtually at no cost to the Commission. The functions performed by the Mellon Bank, including the creation of a fee data base, the deposit of all monies collected into the Treasury, and the express shipment of filings to the Commission, are all paid for by the Department of the Treasury, not the Commission. In addition, the Treasury's payment to Mellon for these services are made out of non-appropriated funds that accrue to the Treasury by virtue of the interest imputed because of earlier deposit of fees. Thus, lockbox filing also provides the most cost-effective cash management technique for the government as a whole, assuring that government revenues are maximized and collection costs minimized. No "in-house" fee collection process could achieve similar cost benefits.[10]

11. Moreover, we do not believe shifting the purely ministerial function of application receipt to the Mellon Bank's offices in Pittsburgh contravenes the requirement in 47 U.S.C. § 154(e) that the Commission maintain its

"principal office" in Washington, D.C.[11] The Commission's headquarters and the vast majority of its personnel operate from offices in Washington, D.C. Commission meetings are routinely held in Washington, and the substantive processing of the underlying filings is done by Commission staff in Washington where it is express shipped by the Bank, generally within three days of initial filing. Only the fees associated with the FCC filings are processed by the Mellon Bank in Pittsburgh.[12]

B. Alternative Lockbox Locations

12. The FCBA, Telocator, and R&H also argue that, even if the FCC relies upon a lockbox bank for fee receipts, there are less burdensome alternatives to use of the Mellon Bank in Pittsburgh. The FCBA and Kaye, Scholer suggest that reliance upon a federal lockbox facility in Philadelphia would be far less burdensome on Washington-based firms since it is closer and more accessible by passenger train and air. These same petitioners assert, however, that the best alternative would be the establishment of a federal lockbox bank in Washington, D.C. Petitioners urge the Commission to establish a working group with other affected federal agencies to study this issue and inform the public how they can participate in the lockbox location process by *Public Notice*.

13. The Mellon Bank was originally selected by the Department of the Treasury as a lockbox facility for FCC fee processing based on its proximity to Washington and outstanding reputation in the cash management field.[13] *Fees II*, 5 FCC Rcd at 3562, note 9. Having developed a relationship with the Mellon Bank in conjunction with the implementation of *Fees I* in early 1987 and having had favorable experiences with the bank through the course of that program,[14] we selected Mellon Bank as the lockbox facility for our expanded fee collection program in *Fees II*. In so doing, we considered geography, transportation facilities, as well as the fact that many FCC filers had become accustomed to filing through the Mellon Bank before determining that a continuation and expansion of our relationship with Mellon would provide the best practicable means for collecting the new fees. Given the 150 day time frame for the implementation of *Fees II*, and Mellon's experience with our requirements, it is unlikely that any other bank could have achieved such a smooth transition to the new fee program. Nevertheless, at an appropriate time in the future, we intend to explore the use of other lockbox facilities (those currently in existence as well as those to be created by the Department of the Treasury), weighing the disruption which would be caused by any change in location against the geographic convenience of any new location and the reasonable expectation of the new facility's ability to satisfy the FCC's requirements in the handling of fees.[15]

C. Other Filing Procedures

Split Filings

14. If the Commission continues to utilize the lockbox for fee filings, FCBA, Telocator and R&H suggest that applicants be given the option of either sending all materials to the Pittsburgh lockbox or sending the fee check and FCC Form 155 to the lockbox bank while submitting the underlying application or other filing directly with the FCC. Petitioners note that under this procedure the bank would not be required to handle often voluminous and sometimes information-sensitive documents. Blooston, Mordkofsky suggest a similar bifurcated fee filing procedure under which the fee payment and a bar coded fee form would be filed at the lockbox bank while the application or other filing, together with a copy of the bar coded fee form, would be submitted directly to the FCC.

15. In determining how best to utilize the services of the lockbox bank for fee filings, we considered a bifurcated filing procedure in which fees would be sent directly to the Bank and applications or other feeable filings would be sent directly to the FCC. However, any such scheme would require the matching up of fee payments and underlying filings. Because parties often file multiple applications at the same time and applicants' names may be similar, we concluded that the matching process could consume substantial Commission resources, delay substantive processing, and potentially create a source of errors. To reduce these costs and potential errors, we also considered the use of pre-numbered or bar coded fee forms for this purpose, but we determined that the overall convenience of the filing public would be better served by permitting the use of a fee form that could be duplicated by the filer, thereby precluding the use of uniquely identifyable fee forms.[16] We also considered transporting Washington receipts to Pittsburgh for fee processing, but determined that that process would impose substantial unnecessary costs on the Government, including the cost of shipment as well as salaries and space for staff that would create and maintain records on the materials accepted for filing and shipped to the Bank. In the end, we concluded that the costs and delays of either the matching or shipping alternatives outweighed their benefits, *see* 5 FCC Rcd at 3564, and we continue to believe that the lockbox bank filing procedure adopted in *Fees II* best serves the overall interests of the filing public and the government.[17] However, because of the continued interest in filing in Washington, we are currently looking into a split filing procedure that would minimize the Commission resources involved.

Deposit Accounts

16. Kaye, Scholer suggest that we adopt a deposit account procedure similar to those used by the Patent & Trademark Office or U.S. Copyright Office. Under such a system, persons may prepay filing fees by establishing a deposit account and the filer would authorize appropriate deductions from its account whenever it submits a feeable filing. The Commission's staff and the Mellon Bank will be exploring the feasibility of such a system in the future.

Back-up Filings

17. *Fees II* established a back-up filing procedure under which applicants may submit an unofficial copy of certain time critical applications, together with evidence of timely shipment to Pittsburgh, to the Commission in Washington to be date stamped and retained by the Secretary's office. The FCBA recommends extending the voluntary back-up filing procedure to all fee filings or, at least to all "deadline" filings. In lieu of the back-up filing procedure, Fisher, Wayland proposes that, whenever a submission is lost or delayed in transit to the lockbox bank, we accept documented proof of delivery of the filing to an established courier on the day before the filing is due in Pittsburgh.

18. The FCBA also suggests that we adopt a true mail-box filing rule under which a document would be considered filed with the Commission on the date it is delivered to an established overnight or same day courier service or receives a postmark from the United States Postal Service. Similarly, Kaye, Scholer propose a mail box rule like the one adopted by the Patent & Trademark Office, under which filings are considered to be filed "on the date that the paper or fee is shown to have been deposited as Express Mail with the United States Postal Service (unless the date of deposit is a Saturday, Sunday or federal holiday) provided that the submission includes a certificate of mailing, in a form prescribed by Patent and Trademark Regulation." *See* 37 C.F.R § 1.10. Blooston, Mordkofsky propose the use of registered mail as an alternative to overnight couriers, and Fisher, Wayland recommend that the Commission include non cut-off deadline filings within the "next-day" filing policy on the basis that such filings may face substantial monetary forfeitures or penalties for failure to file on time.[18]

19. Telocator asks that we accept a certificate of delivery to an express carrier in lieu of the signed courier receipts currently required for back-up filings. Petitioners note that many firms have arranged for regular pick-up of packages by express carrier personnel which often occur after 5:30 p.m. Thus, on the day on which a back-up filing must be submitted to the Secretary, a signed receipt would not be available until after 5:30 p.m., unless, of course, the filer delivered the package to the express carrier before 5:30 p.m. Telocator proposes that we require a copy of a signed receipt only in those cases where a filing is lost or delayed, or, alternatively, allow the filer to certify delivery to an express carrier and later provide signed copy of a receipt.

20. The back-up filing procedure was intended to accommodate the concerns of parties accustomed to filing in Washington who feared that their submissions to the lockbox bank would be lost or delayed in transit. Under this procedure, an unofficial copy of the application, together with evidence of timely delivery to an express carrier may be submitted to the Commission in Washington. If the official application is lost or delayed, the back-up filing may be used as evidence of a timely submission, so long as the back-up filing was submitted to the FCC Secretary's Office by the close of business on the established deadline date. 5 FCC Rcd at 3565. Because a filing delivered to an express carrier on the deadline date would not be expected to reach the lockbox bank until the next day, we also indicated that filings subject to the back-up procedure would be considered timely if they reached the bank on the next business day after the Commission established deadline date. *Id.* It was our intention that the back-up filing would only be referred to where a submission was lost or delayed in transit to Pittsburgh.

21. Although we appreciate the desire of Washington entities for more certainty concerning filings, we are unpersuaded that any expansion of the back-up filing procedure is warranted at this time. As noted above, the procedure adopted was an accommodation to parties that were accustomed to filing in Washington, but it was limited to submissions that would be unacceptable for filing if submitted late. To extend the procedure to all deadline filings would so substantially increase the burden on the Commission's record keeping and storage resources that we could not feasibly adopt this proposal. Moreover, any potential adverse consequence of untimely filing of other applications or reports subject to fees is not likely to be so serious that an extension of the back-up procedure is warranted.[19]

22. We also realize that other agencies and some courts have utilized a "mail box" rule to determine filing dates, and a "mailbox" rule would provide certainty with regard to the timeliness of filings. However, a "mail box" rule does not address the situation where the filing is lost in transit and simply not received at the bank. As discussed above, we think the back-up filing procedure addresses the problem of filings that are either lost or delayed in transit, and it provides absolute certainty for those filings in which timeliness is really critical. Moreover, a "mail box" rule would have other drawbacks. For example, information concerning the filing of applications may be critical to the legal rights of others. Because submissions to the FCC are routinely made from locations throughout the United States, a date certain filing deadline makes information contained in other filings available to others several days earlier than a "mail box" rule, under which we would have to wait some additional amount of time for receipt of filings that may be in transit to the Mellon Bank.

23. We agree with commenters, however, that it is appropriate to reduce the level of documentation provided with the back-up filing procedure. Thus, immediately upon adoption of this *Memorandum Opinion and Order*, so long as the filing itself is submitted to the FCC by the close of business on the established deadline date, documentation (in the form of a signed carrier receipt) or certification of delivery to the carrier will not be routinely required but must be submitted if any issue arises concerning timely receipt of the Pittsburgh filing.

Date Stamp/Receipts

24. Telocator seeks clarification of the date stamp/receipt procedures by which the Bank returns a copy of the filing to the applicant. Petitioner notes that there have been problems in getting date stamped copies returned by the Bank, and suggests that we accept an affidavit from the applicant or its counsel or an express carrier or courier service invoice as proof of filing. *Fee II* indicated that, upon request, the Bank will date stamp and return a courtesy copy of a filing.[20] While there may have been some problems with this procedure during the early phases of the implementation of *Fees II*, we issued a June 21, 1990 *Public Notice* providing further clarification,[21] and the process is now operating smoothly.

Fee Form Correction Policy

25. The FCBA also recommends adopting a policy of permitting applicants one opportunity to correct fee form errors and permitting corrected fee portions of filings to be accepted *nunc pro tunc*. Petitioner argues that there is no apparent reason for the "draconian" step of dismissal for minor defects in an otherwise substantively correct fee form that has no bearing on the merits of the application. The FCBA proposes that all fee filings be stamped upon receipt and returned by the Commission with a dated letter explaining the reason for return and giving the filer five business days to amend and refile, *nunc pro tunc*, if acceptable. According to the Petitioner, since the Commission afforded the public little opportunity for input into the adoption of these rules or to familiarize themselves with the program prior to its implementation, it

believes we should allow leniency for a minimum one-year transitional period for minor, non-substantive defects.

26. As we explained in *Fees II*, the submission of an error-free Form 155 is essential to the efficient processing of fees.[22] It would tie up substantial, additional Commission and government resources to implement Petitioner's proposal to date stamp and return such filings with a letter explaining the reason for return, as Petitioner has suggested, and then to routinely reprocess such applications. Moreover, we have issued numerous *Public Notices*, provided pamphlets, held workshops and set up a fee information hotline to ensure that the public is kept fully informed of the proper fee filing procedures. Thus, we find no basis for permitting applicants the opportunity to correct fee form errors.

Multiple, Related Applications

27. K&H ask that the filing procedure for multiple, related applications be clarified.[23] Petitioners propose that a single check be used when an applicant files multiple applications in the same radio service.

28. The difficulty with Petitioners proposal that a single check be used for multiple applications is a practical one – if the filer makes a mistake in calculating the fee the Commission will have no easy way to determine which application is defective. For example, if the check received only covers nine stations and the application involves ten, all ten stations' applications were rejected. Rather than deal with controversies of this nature, we concluded that the better approach would be to require a separate check for each application so that there is no question as to which fee covers which application.

Microfiche Requirement and Form 155

29. Telocator asks that the Commission reconsider the need to microfiche FCC Form 155 with mobile services filings. According to the Petitioner, the rules currently require applicants making certain filings of more than five pages to submit microfiche copies to the Commission and Form 155 is included in the page count. Petitioner argues that Form 155 should not be counted because it is intended to facilitate only the fee processing program and is not necessary to the substantive review of an application. According to the Petitioner, an exemption is "in the public interest since it reduces filing time and resources necessary to generate the additional FCC Form 155,"[24] and Form 155 does not offer information that should be maintained in the Commission's files.

30. Because controversies may arise concerning fees, the Commission considers it necessary to retain the fee form with the application form, and exempting Form 155 from the microfiche requirement would defeat the very purpose underlying the microfiche requirement – the reduction of storage space requirements. Accordingly, FCC Form 155 will continue to be included in the five page count minimum until such time as the forms are revised to incorporate this information in the application itself and the filing of a separate Form 155 is no longer necessary.[25]

Filing FCC Form 155 with Forms 402, 402-R and 405-A

31. K&H propose that, in addition to exempting FCC Forms 574, 753, 404 and 506 (which all apply to private radio services), from the requirement that a Form 155 be submitted, *see* 5 FCC Rcd at 3570, we should extend the fee form exemption to include FCC Forms 402, 402-R (we believe that Petitioners mistakenly labeled this as 402-A) and 405-A, which "similar to the exempted forms, also apply to the private radio services and require a set filing format, fee and code."[26] As explained in *Fees II*, FCC Forms 574, 753, 755, 404 and 506 were exempted from the Form 155 requirement because those forms were in the process of being revised and, in that revised form, they would include the fee form data. 5 FCC Rcd at 3570. FCC Form 402 is a single use form used to request an authorization in the Private Operational Fixed Microwave Service. Because the fee code and fee amount for authorizations requested on this form is always the same, we agree with Petitioners that we can dispense with the Form 155 requirement. Section 1.1102 of the Commission's rules, 47 C.F.R. § 1.1102, will be amended accordingly, as set forth in the attached *Appendix*. Form 402-R is already exempt from the Form 155 requirement.[27] On the other hand, FCC Form 405-A has multiple uses. The fee code and fee amount differ according to the authorization requested. Because the fee code/amount information contained in FCC Form 155 is necessary whenever a request is submitted on a Form 405-A, we shall, consistent with the guidance of OMB, continue to require that a separate Form 155 be filed with such applications.

III. APPLICABILITY OF SPECIFIC FEES (REQUESTS FOR WAIVERS, EXEMPTIONS, AND/OR CLARIFICATIONS)

A. Part 69

32. Southwestern Bell Telephone Companies argue that the Commission should clarify *Fees II* and affirm that the new accounting and audit waiver fee does not apply to requests for waiver of the Part 69 tariff rules and requirements.[28] According to Petitioners, the separate fees established for tariff filings should adequately cover the Commission's costs for processing Part 69 waivers, and such waivers do not pertain to accounting and audit rules.

33. The legislative history of the new accounting and audits waiver fee indicates that the fee was intended to apply only to requests for waiver of any accounting and audits rules included in Parts 32, 36 and 69.[29] We agree that Congress did not intend the waiver fee to apply to requests for waiver of tariff rules and requirements included in Part 69, and clarify herein that we will henceforth follow this interpretation. The costs of such waivers will generally be included in the fees established for tariff filings.

B. Field Audit/Attestation Audit

34. P&N Bell (jointly) request the issuance of guidelines by the Commission to clarify what constitutes a field audit and a review of an attestation audit for purposes of triggering the imposition of a fee.[30] Given that such audits are involuntary in nature, Petitioners suggest that there is a potential for unfairness in the imposition of these audit fees. They urge us to set a standard which recognizes that there is a direct relationship between the Commission's processing costs and the imposition of the fees. In the case of repetitive audits that are the result of random selection, rather than the result of a carrier's past compliance record, Petitioners request guidelines which provide for relief from either the fee or the audit.

35. According to the Petitioners, with respect to a field audit, it is unclear whether the definition in *Appendix C* to *Fees II* and the section-by-section analysis would encompass a staff visit merely to collect information. While the review of an attest audit is explained more fully in *Appendix C* than the field audit, Petitioners contend that it is not clear if the fee is triggered every time a staff member examines an audit conducted by an independent accounting firm attesting to the methods used by a carrier to allocate costs between regulated and nonregulated activities as set forth in the carrier's cost allocation manual. Petitioners conclude that neither the imposition of a fee of $62,290 for a staff visit merely to collect information nor the imposition of a fee of $34,000 when a staff member merely examines the cost allocation of a specific item are consistent with the goal behind the fee schedule because the fee far exceeds the actual costs involved. U.S. West proposes that the Commission "define what is meant by a full-blown audit, *i.e.*, the length of time, number of staff, subject matter involved" which would require the fee. Moreover, Petitioners suggests that "[t]o strike a proper balance between the cost of regulation and financial burden on carriers, a less than full-blown field audit (say, a one week audit on a specific issue) should require a proportionately smaller fee," or alternatively, the Commission could charge a blanket annual audit fee of $96,290, which would be refunded if no audits are performed.[31]

36. For purposes of the audit fee program, a field audit is a thorough review of a subject area which requires on-site field work. The primary purpose of a field audit is to determine whether a carrier is in compliance with the Commission's rules and policies. Survey audits are preliminary reviews which involve information gathering for purposes other than determining compliance with the Commission's rules. Additional field work as a follow up to a field audit is not considered a separate field audit subject to additional audit fees. Attest audit reviews constitute comprehensive reviews of the work papers of the independent auditors attesting to carriers' regulated/nonregulated procedures and accounting figures. A survey or a cursory review of these work papers would not be considered an attest audit review and would not be subject to an audit fee. The purpose of an audit is to investigate any possible improprieties by carriers. We do not believe it would be appropriate for the Commission to restrict its investigatory authority, *e.g.*, only allow a specified number of audits per year, regardless of the circumstances giving rise to the audit. Nevertheless, if a carrier believes that it has been subjected to unnecessary, repetitive audits and thus forced to pay burdensome fees, it should so inform the Commission, and we shall carefully review such claims. As to Petitioners suggestion that we charge for audits by the amount of auditing work performed, we emphasize that Congress did not set this fee on a proportionate basis. In any event, we do not anticipate that any such fees would be disproportionate to the actual expense involved.

C. Low-Earth Orbit Satellite Systems

37. VITA, a non-profit entity, provides developing countries with a variety of information and technical resources "aimed at fostering basic infrastructure development and self-sufficiency . . . placing particular emphasis on renewable energy applications, agriculture and food processing, water supply and sanitation, housing and construction, small business development, and information management."[32] Petitioners argue that because of their purpose and non-profit status, they are analogous to entities exempted from fees under section 8(d)(1), and the Commission should therefore "interpret" section 8(d)(1) to include them.

38. Congress specified the following radio services to which fees do not apply: local government, police, fire, highway maintenance, forestry-conservation, public safety, and special emergency radio, as well as governmental entities licensed in other services. 47 U.S.C. § 158 (d)(1). Since non-profit entities are not exempted, we find no basis upon which to grant an exemption. Moreover, we do not think the services are so analogous to exempted services that they should be covered. By comparison, we exempted OFS licensees under section 8(d)(1) only where they are engaged in services that support the emergency and public safety activities that are expressly exempted.[33]

39. In conjunction with VITA's provision of LEO satellite communications systems, VITA also questions whether fees should apply because so many more satellites must be put up with this system. According to VITA, the potential filing fees for authority to construct, launch and operate its planned low-earth orbit (LEO) satellite communications systems that facilitate high-speed data links between inexpensive personal computer-based ground stations "would exceed $72,000 for each planned space station," in addition to "substantive fees associated with applications to construct and operate the U.S. ground segment for this communications system."[34] Even if an applicant were to request a fee waiver with each application filed with the Commission, Petitioners maintain that the up front payment they would be required to make would be of considerable magnitude.[35]

40. While we agree that the filing fees involved are significant because of the greater number of satellites required for these systems, the fees represent only a small fraction of the cost of each satellite. Moreover, we note that the Commission must still do the same amount of work for each satellite application. Accordingly, we find no basis for exempting LEO satellite systems from filing fees.

D. Certification in Annual Ownership Report

41. Each licensee of a commercial AM, FM or TV broadcast station is required once a year on the anniversary date its station renewal application is scheduled to be filed, to inform the Commission as to the current ownership structure of the station. This is done by filing an ownership report, FCC Form 323. A separate Form 323 is required to be filed by any entity or entities who directly or indirectly control the licensee or have an attributable interest in the licensee. Where there has been no change in ownership since the station's last annual report, a letter may be filed on behalf of the station in lieu of a new report stating that the previous report has been examined and is currently accurate and complete. This letter certification is then filed in lieu of FCC Form 323 and constitutes a station's annual ownership report for that year. Congress created a fee to accompany these submissions and NAB argues that the Commission should not require a fee from a broadcast licensee who, in compliance with section 73.3615 of the Commission's rules, annually files a simple statement indicating "no change" in the ownership structure of the licensee.[36] In describing the ownership report fee, the legislative history specifi-

cally provides that the fee applies to both a full report and the certification of "no change."[37] Thus, we find no basis for granting such an exemption herein.

E. Noncommercial International Broadcasters

42. NASB asks the Commission to reconsider *Fees II* insofar as it concludes that Congress did not intend to exempt noncommercial international broadcasters from the payment of filing fees. According to Petitioners, in *Fees I*, we broadly interpreted the congressional exemption for noncommercial educational stations to include AM stations operating in accordance with section 73.503 of the Commission's rules, and, consistent with that approach, we should have also exempted noncommercial international stations from the ..ew fees created by Congress in 1989.

43. In the *Fees I Reconsideration Order*, we dealt with a request for a fee exemption for noncommercial low power television stations (LPTV). 3 FCC Rcd at 5988-89. We therein noted that Congress created fees for "Commercial" radio and television and "FM/TV Translators and LPTV Stations," thereby implying that there was no exemption for noncommercial educational LPTV stations. However, we found that the congressional exemption for noncommercial educational applicants was intended to enhance the financial support provided by the government for such services, and the imposition of a fee on noncommercial educational LPTV applicants that received federal funding would undercut that policy. 3 FCC Rcd at 5988.

44. We face a similar situation here with respect to international broadcasters. Like LPTV, the fees created by Congress are not limited to commercial international broadcasters. However, unlike LPTV, the government does not provide financial support through Corporation for Public Broadcasting and National Telecommunications and Information Administration facilities grants. Thus, the considerations that persuaded us to exempt noncommercial educational LPTV from fees are not present with respect to the international shortwave broadcasters. Moreover, in creating fees for international shortwave broadcasting, Congress was no doubt aware of the fact that many major international licensees were noncommercial. Thus, the fact that Congress did not create an exemption for noncommercial educational international broadcasters indicates that it intended these fees to apply to all such broadcasters, and we will not create an exemption for this service.

F. Rule Making Petitions

45. Crisler proposes the deletion of any fee for a Rule Making petition, labeling it "an unconstitutional tax on the ability of the public to participate in the process of government."[38] However, fees are not assessed for routine Rule Makings of general applicability, nor are there fees for Rule Makings to amend the FM or TV Tables. Rather, the fee applies only to petitions for Rule Making which, if granted, would effectuate the upgrading of a particular station by changing its community of license (TV), or changing its community of license or its channel (FM).[39] These Rule Makings are the first step in an effort to upgrade a station, and the fee is only payable if the licensee is successful in achieving the upgrade.[40]

G. Fee Refunds

Hearing Fee Refunds

46. ECB proposes that we amend section 1.1111(c)(2) of the Commission's rules to require a refund of a hearing fee in a comparative broadcast proceeding if only one applicant files a Notice of Appearance and the only outstanding issue precluding a grant of the application is an air hazard issue, where such issue can be resolved by submission of a notice of no air hazard from the Federal Aviation Administration.

47. Hearing designation and issuance of a decision by an Administrative Law Judge are required in all cases where the FAA has failed to issue a no air hazard notice. We therefore believe that a hearing fee is appropriate in such cases. We find no basis upon which to grant a refund merely because a particular type of hearing issue may be capable of expeditious resolution. The same could be true of many other types of hearing issues, and we see no reason to single out air hazard issues for special treatment.

48. Experience indicates, however, that our decision in the *Fees I Reconsideration Order*, 3 FCC Rcd at 5990, to retain hearing fees whenever the sole surviving applicant had to satisfy a directive specified in the designation order is no longer warranted. We are thus, on our own motion, amending section 1.1111 the Commission's rules, 47 C.F.R. § 1.1111 to provide for the retention of the fee only where a decision on the merits is required to resolve an outstanding issue.

Ship and Aircraft Stations

49. ECB argues that a routine waiver involving the aeronautical enroute service in general could cost them about $500,000 if every station were involved and were charged for separately. As a consequence, according to Petitioner, applicants will make their requests pursuant to a petition for Rule Making, rather than through waiver requests, which will be more burdensome and time-consuming of the Commission's resources. ARINC requests clarification that fees for applications relating to aircraft fleet licenses apply per application, not per station. According to ARINC and K&H, to apply the fee on a per unit basis is inconsistent with the Budget Act which specifically says to charge only the minimum fee necessary per application (without regard to the number of units or transmitters licensed).[41] In addition, ARINC also asks for a determination that routine requests for waivers require a single fee of $105 regardless of the number of stations or rule sections that might be involved if the waiver addresses a single issue and can be resolved in a single order.

50. In amending the Schedule of Charges, Congress explained in the legislative history that "[r]equests for a fleet license will be charged according to the number of stations requested."[42] Accordingly, the interpretation urged by ARINC is flatly inconsistent with the congressional intent and will not be adopted. Petitioners' request that routine waivers be assessed a single fee, regardless of the number of stations or rule sections involved, is also inconsistent with congressional intent. The legislative history explicitly provides that non-routine waivers "involve more than one rule section or station."[43] Therefore, waiv-

ers involving more than one station must be treated as "non-routine" waivers for which a separate charge is made for each station.[44]

Construction Permits

51. William L. Moir argues that an applicant for a vacant FM allotment applying under the "first-come, first-served" rule, 47 C.F.R. § 73.3573(f)(3), should be entitled to a fee refund where such applicants request the dismissal of their application upon learning that there is a previously filed pending application for the same vacant channel. According to Petitioner, delays in updating the Commission's computer data base often make it impossible to determine if another applicant has already applied for the channel in question. Petitioner maintains that it is "unfair to penalize applicants who never reach the starting gate of application processing."[45]

52. Although our decision in *Fees II* to rely on the Mellon Bank for fees processing has cut the lag time in processing these applications and updating the Commission's computer base, we agree that a refund is warranted in these situations, where, at the time an application is filed, the Commission's data base does not indicate that there is pending any previously submitted application for the same vacant allotment. Accordingly, we will amend section 1.1111 of the Commission's rules, 47 C.F.R. § 1.1111, to permit fee refunds to such applicants filing under the "first-come, first-served" procedure in 47 U.S.C. § 73.3573(f)(3). The refund request must be filed within fifteen days of issuance of an FCC *Public Notice* indicating that the first such previously filed pending application was received but not yet accepted for tender, and the applicant requesting the refund must also have requested dismissal of its application. Of course, as the Petitioner agrees, no refund will be available for those applicants who wish to remain on file "queued" behind the first applicant.[46]

H. Sea Scout Program Vessels

53. SSA requests a waiver of the $320 ship inspection fee for a vessel operated by its Sea Scout program. To obtain the necessary Coast Guard certification, SSA must first obtain an FCC certification of the vessel's radio installation. According to Petitioners, the 64' vessel was acquired through government surplus and restored by volunteers. It is used for training Sea Scouts and for the benefit of the Boy Scouts. The vessel is operated for $3,800 annually, including $3,000 for insurance, and, according to SSA, the $320 FCC fee represents a "good share" of their annual operating costs. The waiver is requested because the boat is owned and operated by a tax exempt organization "for the benefit of youth members."[47] Although couched as a request for a waiver of the ship inspection fee for a single vessel, we are treating this waiver request in this proceeding because we believe that there may be numerous other situations involving Boy Scout Councils or similar not-for-profit youth organizations, requiring ship inspections, FCC licenses, and/or waivers of our rules pertaining to required radio equipment.

54. When Congress enacted the current fee schedule, it indicated that entities "who utilize the FCC's processes should be assessed some of the costs of operating the agency. The fees represent a fair approximation as to how these costs should be distributed."[48] Generally, in weighing whether requests for fee waivers are in the public interest, we have considered whether the requested waiver would further the policies underlying the congressional creation of fee exemptions and, in rare circumstances, whether the imposition of a fee in a particular case would be so out of keeping with the fair distribution of costs so as to justify a waiver. Here, it does not appear that the requested waiver would further the policies underlying any congressionally created fee exemptions. Congress is aware of the fact that many not-for-profit organizations use radio in the conduct of their programs, but Congress created fee exemptions for only some of those entities. *See e.g.*, 47 U.S.C. § 158(d)(1). Nor did Congress create any specific exemption for youth organizations. Moreover, it does not appear that the imposition of a $320 ship inspection fee on SSA would in any way preclude them from carrying out their organization's activities. Finally we note that Congress intended the waiver provision to be construed "narrowly,"[49] and we are concerned that granting a waiver in these circumstances would render it virtually impossible for us to deny waivers to a multitude of similar groups who may have equally laudable purposes. In these circumstances, and consistent with the clear congressional intent that we grant waivers only in a very narrow class of cases, we concluded that grant of SSA's waiver request would not promote the public interest.

I. Modification of PPMRS licenses

55. Blooston, Mordkofsky contend that the staff has erred in applying fees for certain application in the Point-to-Point Microwave and Local Television Radio Services. Specifically, section 1.1105(f)(1) of the Commission's rules currently assesses a fee for a conditional license, 47 C.F.R. § 1.1105(f)(1)(i), for modification of a conditional license, 47 C.F.R. § 1.1105(f)(1)(ii), and for an initial license for a new frequency, 47 C.F.R. § 1.1105(f)(1)(iii). In applying these fees, Petitioners contend that the staff has erred by requiring an applicant to pay a fee with each of the following: 1) its application for conditional license; 2) its initial license upon certification that it has completed construction; 3) its application to modify the license; and 4) its certification that it has completed the modification. According to Petitioners, where the modification does not involve a new frequency, an additional fee is not contemplated by the rules.

56. We agree with the Petitioners. The fee legislation from which our rules derive indicates a congressional intent to levy a fee on PPMRS applications for an "Initial License for New Frequency." 47 U.S.C. § 158 (Schedule of Charges). Neither the statute nor its legislative history indicates an intent to charge a fee for previously licensed PPMRS facilities that are subsequently modified, where the modification does not involve a new frequency.[50] Similarly, our rules do not indicate an intent to charge a fee in such circumstances. 47 C.F.R. § 1.1105(f)(1); *Fees I*, 2 FCC Rcd at 973. We emphasize, however, that a fee is due for applications for a PPMRS license where the modification of the "initial license" involves a new frequency.

J. Restricted Radiotelephone Operator Permits

57. A joint Petition filed by National Public Radio, National Federation of Community Broadcasters, and Intercollegiate Broadcasting System, Inc., seeks reconsideration of that portion of *Fees II* that requires payment of a $35 fee with applications for Restricted Radiotelephone Operator Permits (RPs), when such applications are filed by persons intending to work at noncommercial educa-

tional (NCE) broadcast stations. The National Association of College Broadcasters (NACB) and the Curators of the University of Missouri filed petitions for reconsideration seeking similar relief. Harvard Radio Broadcasting Co., Inc. (Harvard) requests a blanket waiver of the fee for all RP applicants, including "student volunteers at academically affiliated stations -- both commercial and non-commercial."[51]

58. The joint petitioners argue that Congress clearly intended to exempt NCE broadcasters from the Schedule of Charges enacted in the 1989 Budget Act. Although the RP application fee is to be paid by the individual applicant, not the station, petitioners all contend that the imposition of the fee will ultimately inure to the detriment of these stations. The joint petitioners point out that NCE stations rely heavily on volunteers who may be unwilling or unable to pay the fee. In this connection, NACB alleges that, because student volunteers typically work one or two on-air shifts of only a few hours each week, stations would need as many as 50 individuals with RPs to fill on-air positions. NACB contrasts this with the typical commercial station that can get by with as few as 10 RPs, each of which works full-time for the station.

59. As a result of the normally expected turnover of students and station volunteers, the University of Missouri estimates that as many as 70 new RPs are required each year for its five stations, and the joint petitioners estimate that NCE stations typically require from 10 to 30 volunteers with RPs per year. In submitting these estimates, the joint petitioners recognize that not all jobs at a station require an RP, but the staffing requirements of NCE stations often require more RPs than would normally be expected.[52] It is alleged that many stations are unable to reimburse students and volunteers for the application fee, and the fee will discourage young and economically disadvantaged persons from participating in station activities. In the view of some petitioners, the potential loss of new volunteers may require the curtailment of a station's operations.

60. Because it is an individual, not the NCE licensee, that applies for the RP, we do not believe that the congressional intent to exempt NCE licensees from the fees requires an exemption for RP applicants that intend to work at NCE stations.[53] Nevertheless, the record indicates that the imposition of the fee on persons who intend to work at NCE stations may impose a very real hardship on such stations. Unable to get a sufficient number of students or other volunteers who were willing to pay the fee, a station would either have to curtail operations or compensate persons who apply for an RP and work at the station. In either case, the imposition of the fee would dilute the financial support offered to these stations by Congress. Consequently, an exemption from the RP application fee for persons at NCE stations would be consistent with the intent of Congress in exempting NCE stations from other fees and the policy enunciated by the Commission when we created a similar exemption for NCE low power television. *See Establishment of a Fee Collection Program*, 2 FCC Rcd 947, *recon. granted in part*, 3 FCC Rcd 5987, 5988-89 (1988).[54]

61. However, the RP is a lifetime permit authorizing the operation of certain radio transmitting equipment, including commercial broadcast stations and stations in the Aviation and Marine services. *See* 47 C.F.R. §§ 13.4, 13.5, 73.1860, 74.18, 80.163, 80.165, and 87.87(b). Petitioners recognize that a person applying for an RP under an NCE fee exemption should not be able to use the permit at commercial broadcast or other radio facilities. They suggest that such fee exempt RP be either limited to NCE facilities or granted for a term of 5 years. We believe that limiting the permissible uses of a fee exempt RP would be administratively more efficient.

62. Thus, applicants for an RP to be used exclusively at an NCE station will be fee exempt. Applicants claiming the exemption should submit their applications (on FCC Form 753) directly to the Commission at Gettysburg, Pennsylvania. Applications submitted in this manner must be accompanied by a certification, signed by the applicant, that: "The Restricted Radio Telephone Operator Permit being applied for will be used only at a noncommercial educational station."[55] The permit, returned to the applicant by the Commission, will bear a notation that it is good only at a NCE station.[56]

63. The certification required to establish an applicant's eligibility for the fee exemption created herein is not a "collection of information" within the meaning of the Paperwork Reduction Act. 44 U.S.C. § 3502(4). As established by the rules of the Office of Management and Budget, "information" does not generally include "certifications." 5 C.F.R. § 1320.7(j)(1).

IV. PUBLICATION OF FEE DECISIONS AND PUBLIC NOTICES

64. The FCBA also proposes formalizing a policy of issuing *Public Notices* to clarify any ambiguities in the fee collection program and to educate the public concerning the Commission's expectations and practices to be avoided. Petitioners note that while the Commission's rules should provide applicants with sufficient guidance, as a practical matter, questions of broad applicability arise which usually require answers on a time-sensitive basis. According to Petitioners, such an approach was successfully used recently in the process of accepting applications for Domestic Public Cellular Radio Service applications for the Metropolitan Statistical Areas and Rural Service Areas. Accordingly, the FCBA recommends that we issue notices at least once a week, and publish the entire text of all fee determinations in the FCC Record, rather that just list what determinations have been placed in the fee docket.

65. Although we have not followed any set schedule, the Commission has periodically issued *Public Notices* clarifying fee procedures, summarizing FCC fee decisions of significance or addressing other issues that we felt needed to be addressed. In addition, we have held a number of workshops and so-called "brown bag lunches" on a variety of fee-related topics.[57] Fee Filing Guides are available through the Commission's Office of Public Affairs and Field Offices and additional information may be obtained through the Fees Hotline at (202) 632-FEES. We believe that we have already accomplished on an informal, as needed basis essentially what Petitioners are requesting -- using an approach which better utilizes scarce Commission resources. As to publishing the full text of all FCC fee determinations, we agree with Petitioners that following this practice would be instructive, without being overly excessive in cost. Accordingly, we will henceforth publish the full text of all fee decisions in the FCC Record.

Other Matters

66. It has come to our attention that the Schedule of Charges adopted by the Commission in *Fees II*, *see* 5 FCC Rcd at 3581-3635 (1990), contains several incorrect references to FCC Form numbers and fee amounts. Accordingly, we will take this opportunity to make the necessary, minor editorial changes in the *Appendix* attached hereto.

V. CONCLUSION

67. Accordingly, IT IS ORDERED, That Parts 1 and 13 of the Commission's rules, 47 C.F.R. Parts 1 and 13, ARE AMENDED, as set forth in the *Appendix*, attached hereto.

68. As the rule changes set forth in the *Appendix* are procedural or grant an exemption to a fee payment requirement, they will be effective immediately upon release of this *Memorandum Opinion and Order*. 5 U.S.C. § 553(d). Moreover, it is our intention to apply the rules, clarifications and policies enunciated herein to all pending cases involving the collection of fees unless it appears that the filer acted in reliance on prior contrary pronouncements to its detriment. We will commence publication of all fee decisions in the FCC Record within sixty days of release of this *Memorandum Opinion and Order*.

69. IT IS FURTHER ORDERED that the petitions for reconsideration, partial reconsideration and/or clarification filed by Ross & Hardies; William L. Moir; Bellsouth Telephone Companies; The National Association of Broadcasters; Volunteers in Technical Assistance, Inc.; The National Telephone Cooperative Association; Fisher, Wayland, Cooper & Leader; C.R. Crisler; Walker, Bordelon, Theriot and Hardy; The Federal Communications Bar Association; Kaye, Scholer, Fierman, Hays & Handler; Telocator; Southwestern Bell Telephone Company; Keller and Heckman; Emerald Coast Broadcasting; The National Association of Shortwave Broadcasters; Blooston, Mordkofsky, Jackson and Dickens; Aeronautical Radio Inc.; and Sea Scouts Association, Columbia Pacific Council, Boy Scouts of America; and Pacific Bell and Nevada Bell Telephone Companies are GRANTED to the extent indicated above and are DENIED in all other respects.

70. IT IS FURTHER ORDERED that the Motion for Stay filed by National Public Radio, National Federation of Community Broadcasters, and Intercollegiate Broadcasting System, Inc. and the Motion for Partial Stay filed by Harvard Radio Broadcasting Co., Inc. ARE DENIED.

71. IT IS FURTHER ORDERED that the Motion for a Blanket waiver filed by Harvard Radio Broadcasting Co., Inc. IS GRANTED to the extent indicated above and IS DENIED in all other respects.

72. Authority for this action is contained in section 4(i) and 8(f) of the Communications Act of 1934, as amended, 4 U.S.C. §§ 154(i) and 158(f).

For further information on this proceeding, contact Sharon Kelley, Office of General Counsel, 202/632-6990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Parts 1 and 13 are amended as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: Sec. 3001(a), Pub. L. 101-239, 103 Stat. 2106, 47 U.S.C. 158.

2. Section 1.1111 is amended by redesignating paragraph (b) as paragraph (a)(6), by redesignating paragraphs (c), (c)(1) through (c)(5) as paragraphs (b), (b)(1) through (b)(5) and revising and redesignating paragraphs (b)(3) and (b)(4) and adding a new paragraph (c) to read as follows:

§ 1.1111 Return or refund of charges.

* * * * *

(b) Applicants in the Mass Media Services designated for comparative hearings will be entitled to a grant without payment of the hearing fee or a refund of the hearing fee paid in the following circumstances.

* * * * *

(3) When only one applicant files a Notice of Appearance and pays the hearing fee, that single remaining applicant will be entitled to a refund of the hearing fee upon request if it is immediately grantable or if all issues specified in the designation order and requiring resolution can be deleted. *See* § 1.229 of this part.

(4) When a settlement agreement filed with the presiding judge by the Notice of Appearance deadline (see § 1.221 of this part) provides for the dismissal of all but one of the applicants, and the single remaining applicant is immediately grantable, no hearing fee is due. However, if the applicant cannot be granted without resolution of issues specified in the designation order, it must pay the hearing fee. That payment will be refunded upon request if all outstanding issues can be deleted. *See* § 1.229 of this part.

* * * * *

(c) Applicants in the Mass Media Services for first-come, first-served construction permits will be entitled to a refund of the fee, if, within fifteen days of the issuance of a Public Notice indicating that there

is a previously filed pending application for the same vacant channel, such applicant notifies the Commission that they no longer wish their application to remain on file behind the first applicant and any other applicants filed before his or her application, and the applicant specifically requests a refund of the fee paid and dismissal of his or her application.

3. Section 1.1102 is amended by removing the words "Form 155" in paragraph (3)(a).

4. Section 1.1112 is amended by adding a new paragraph (g) to read as follows:

§ 1.1112 General exemptions to charges

* * * * *

(g) Applications for Restricted Radiotelephone Operator Permits where the applicant intends to use the permit solely in conjunction with duties performed at radio facilities qualifying for fee exemption under § 1.1112(c), (d), or (e) of this section.

* * * * *

2. The authority citation for Part 13 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082 as amended; 47 U.S.C. 154, 303.

1. Section 13.5 is amended by adding a new paragraph (d) to read as follows:

§ 13.5 Eligibility for new license.

* * * * *

(d) Any eligible individual may apply for a Restricted Radiotelephone Operator Permit authorizing only the performance of the permissible duties at noncommercial educational stations. Application for such a limited use Restricted Radiotelephone Operator Permit should be made on the appropriate FCC form and submitted directly to the Commission's Offices in Gettysburg, Pennsylvania. Applications claiming this fee exemption under 47 C.F.R. § 1.1112 of this chapter, should be accompanied by the following certification, signed by the applicant: "The Restricted Radio Telephone Operator Permit being applied for will be used only at a noncommercial educational station." The holder of a Restricted Radiotelephone Operator Permit limited to use at noncommercial educational broadcast stations may request the termination of that limitation by filing an application for a new permit, together with the payment of the fee, in the manner set forth in § 1.1103 of this chapter.

FOOTNOTES

[1] The Petitioners are: Ross & Hardies (R&H); William L. Moir (Moir); Bellsouth Telephone Companies (Bellsouth); The National Association of Broadcasters (NAB); Volunteers in Technical Assistance, Inc. (VITA); The National Telephone Cooperative Association (NTCA); Fisher, Wayland, Cooper & Leader (Fisher, Wayland); C.R. Crisler (Crisler); Walker, Bordelon, Theriot and Hardy (Walker, Bordelon); The Federal Communications Bar Association (FCBA); Kaye, Scholer, Fierman, Hays & Handler (Kaye, Scholer); Telocator; Southwestern Bell Telephone Company (SW Bell); Keller and Heckman (K&H); Emerald Coast Broadcasting (ECB), The National Association of Shortwave Broadcasters (NASB); Blooston, Mordkofsky, Jackson and Dickens (Blooston, Mordkofsky); Aeronautical Radio Inc. (ARINC); Sea Scouts Association, Columbia Pacific Council, Boy Scouts of America (SSA); The National Association of College Broadcasters (NACB); The Curators of the University of Missouri; Harvard Radio Broadcasting Company, Inc. (Harvard); National Public Radio, The National Federation of Community Broadcasters, and The Intercollegiate Broadcasting System, Inc. (Joint Petitioners); Pacific Bell and Nevada Bell Telephone Companies (P&N Bell) (jointly). U.S. West Communications (U.S. West) submitted comments in support of the Petitions filed by SW Bell and P&N Bell.

[2] *See also* Conference Report to accompany H.R. 3299, H.R. Rep. No. 386, 101st Cong., 1st Sess. 20-28, 433-435 (1989), *reprinted in* 1989 U.S. Code Cong. & Ad. News 3036; separate floor statements by Congressman Dingell, 135 Cong. Rec. H9610-9611 (1989), and Senator Hollings, 135 Cong. Rec. S16648-16649 (1989).

[3] 1989 U.S. Code Cong. Ad. News at 3036.

[4] *See* Statement of Congressman Dingell, 135 Cong. Rec. at H9610; Statement of Senator Hollings, 135 Cong. Rec. at S16649.

[5] We think the rules at issue which generally prescribe locations and procedures for submitting congressionally mandated filing and other fees, are clearly "procedural" rules, governing matters that pertain to the FCC's internal administrative operations. The rules neither encode substantive value judgments, nor substantially alter the rights or interests of regulated parties. *See Air Transport Assoc. of America v. Dept. of Transportation*, 900 F.2d 369, 376-78 (1990), and cases cited therein.

[6] *See* Petitions of R&H, Blooston, Mordkofsky, Telocator, Walker, Bordelon, NTCA, Kaye, Scholer and FCBA.

[7] *See* Petitions of Blooston, Mordkofsky, Telocator, R&H, NTCA and Kaye, Scholer.

[8] In a supplemental petition, Kaye, Scholer gives a specific example of a shortcoming involving the Mellon Bank lockbox system. According to the commenter, a May 23, 1990 certification that there had been no change in a station's last ownership report was rejected by the Mellon Bank even though it was in accordance with section 1.1104 of the Commission's rules and the *Mass Media Services Fee Filing Guide*, and was properly accompanied by the required $35 filing fee and a completed FCC Form 155.

[9] Although the FCC did receive a lump appropriations payment to defray the costs of setting up our fee collection system, this one time only appropriation was 4% of the $27,559,000.00 in fees we took in during fiscal year 1990. *See Authorization of Appropriations*, Pub. L. No. 101-396 (Sept. 28, 1990), at section 6(b). The 1.1 million dollar offset we received did not even come close to covering the existing fee program implementation costs. Accordingly, there are no appropriated funds to draw upon for the hiring and maintaining of additional Fee staff.

[10] Similarly, although the FCBA's "extra copy" proposal could eliminate delays associated with the transmittal of applications to the bureaus for substantive processing, unlike the Mellon Bank procedure, it would not eliminate the considerable additional resources the Fee Section would need to process the new fees, including attaching the identifying number, creating a data base for tracking fee collections, and make timely deposits into the Treasury.

[11] *See Order Denying Partial Stay*, FCC 90-202, released May 18, 1990.

[12] As with any human endeavor, errors are possible. The FCC and the Mellon Bank have attempted to keep them to a minimum, and we are committed to correcting any errors that occur as soon as they are brought to our attention. In this regard, we note that the error raised by Kaye, Scholer (*see* note 8, *supra)*, which occurred during the first days of the new program's operation, appeared to be an error by the FCC's Fee Section rather than the Mellon Bank, and was subsequently corrected.

[13] The other choice given to the FCC was a lockbox bank located in Georgia. At that time, there was no federal lockbox bank located in Philadelphia.

[14] *Fees I* was released on February 17, 1987, and the collection of fees commenced on April 2, 1987. 2 FCC Rcd at 947, 978.

[15] The appropriate criteria for lockbox banks is a matter within the primary jurisdiction of the Department of the Treasury. If Treasury enters into a lockbox agreement with a Washington bank, we would certainly consider the use of such a facility for the receipt of FCC fees.

[16] The use of pre-numbered or bar coded fee forms would also be inconsistent with our determination to use the fee form as a temporary device, to be supplanted by the inclusion of the fee form information on the underlying application. 5 FCC Rcd at 3568-69.

[17] Because Bank personnel are concerned only with the Fee Form (FCC Form 155) and payment instrument, there is no basis for petitioners' concern that Bank employees will have access to competitively sensitive information in underlying filings. *See also* 5 FCC Rcd at 3567-68. Moreover, Bank employees have a fiduciary obligation not to disclose information contained in Commission filings. *See* 5 U.S.C. § 552a(m).

[18] The "next-day' policy refers to the fact that a filing subject to the back-up procedure would be considered timely if received by the lockbox bank on the day after the established deadline.

[19] The FCBA cites several examples of filings that it believes should be covered by the back-up procedure, due to the possibility of forfeitures. However, a brief delay beyond the due date in the submission of a renewal application or ownership report, particularly if accompanied by a reasonable explanation concerning the failure of an overnight or other delivery service, would rarely, if ever, result in a forfeiture for "willful or repeated" violation of the rules. As to FCBA's concern regarding hearing fees submitted with notices of appearance, we no longer require fees to be filed with notices of appearance. *See Comparative Hearing Reform*, 6 FCC Rcd 157, 158 (1990).

[20] Where the filing is made by hand, the Bank must be provided with an extra copy of the submission for this purpose. Date stamped courtesy copies are also available by mail to applicants who provide an extra copy of the submission together with a self-addressed, stamped envelope. 5 FCC Rcd at 3567.

[21] Two particular issues relating to this procedure were addressed in this *Public Notice*. First, we clarified that the Commission's policy is to date one piece of paper per Form 155. Thus, in those situations where multiple filings are submitted with one Form 155, filers who wish to have a transmittal cover stamped and returned as a receipt to evidence receipt of the entire "package," were asked to clearly mark the one piece of paper to be stamped and returned and to include return postage. Second, we explained that since the Mellon bank currently only does business with certain express couriers (Airborne Express, Federal Express, DHL, Emery Worldwide and the U.S. Postal Service), the bank can only return a courtesy copy of an application in prepaid envelopes obtained from one of these carriers.

[22] 5 FCC Rcd at 3569-70, at ¶ 25. Contrary to the claims of the FCBA, we also think our rule requiring dismissal of applications that do not conform to these filing requirements, is well within the boundaries of a "procedural" rule, and, hence, was properly adopted without notice and comment.

[23] *See also* Petitions of Telocator, Blooston, Mordkofsky and ARINC.

[24] Petition of Telocator at 10-11.

[25] OMB approval of FCC Form 155 was conditioned upon the incorporation of the fee form data elements into all revised application forms, eventually obviating the need for a separate FCC Form 155. *See* 5 FCC Rcd at 3570.

[26] Petition of K&H at 10.

[27] *See* 5 FCC Rcd at 3582, *Appendix* at 3(c).

[28] *See also* Petition of Bellsouth; Comments of U.S. West.

[29] *See* separate floor statements by Congressman Dingell, 135 Cong. Rec. H9616, at ¶ 21(e), and Senator Hollings, 135 Cong. Rec. S16654, at ¶ 21(e); *see also* 5 FCC Rcd at 3675, ¶ 215.

[30] *See also* Comments of U.S. West.

[31] Petition of P&N Bell.

[32] Petition of VITA at 2.

[33] 5 FCC Rcd at 3573, ¶ 34.

[34] Petition of VITA at 7 and note 9.

[35] *Id.* at 7.

[36] *See also* Petition of Fisher, Wayland.

[37] *See* separate floor statements by Congressman Dingell, 135 Cong. Rec. H9612, at ¶ 1(l), and Senator Hollings, 135 Cong. Rec. S16651, at ¶ 1(l).

[38] Petition of Crisler at 1.

[39] *See* 5 FCC Rcd at 3659, *Appendix B* at ¶ 64, ¶ 70.

[40] Crisler also argues that the Commission should refund fees to applicants that are dismissed early in the process (where less than the average amount of "work" is performed by the staff), and the hearing fee should not apply to applications that were on file prior to the effective date of the fee. The Commission has previously indicated that it would retain fees irrespective of the substantive disposition of the underlying application, and Congress specifically approved of that practice. *See* Conference Report, 1989 U.S. Code Cong. & Ad. News at 3036. Further, in *Fees I*, the Commission applied the hearing fee requirement to applications that were on file prior to the establishment of any fees, and we believe that Congress similarly intended us to collect from all applicants, the new, higher hearing fee when that fee becomes due under the Commission's rules whether or not the applications were on file prior to the effective date of the new fees.

[41] Petition of K&H at 12.

[42] *See* separate floor statements by Congressman Dingell, 135 Cong. Rec. H9610, at ¶ 5(a), and Senator Hollings, 135 Cong. Rec. S16649, at ¶ 5(a).

[43] *See* separate floor statements by Congressman Dingell, 135 Cong. Rec. H9610, at ¶ 4(g), 5(g) and Senator Hollings, 135 Cong. Rec. S16649, at ¶ 4(g), 5(g).

[44] *Id.*

[45] Petition of Moir at 1-3.

[46] Petition of Moir at 3.

[47] *See* Letter to Andrew S. Fishel, FCC Managing Director, from Pat Kelley, Commodore, SSA, dated October 15, 1990, at 1.

[48] 165 Cong. Rec. H9454 (November 21, 1989).

[49] *See* H.R. Rep. No. 453, 99th Cong. 1st Sess. 423 (1989).

[50] *See* note 2, *supra*.

[51] Numerous colleges, universities, station advisors, and station volunteers filed comments and letters in support of the proposed fee exemption. Harvard and the joint Petitioners also seek an administrative stay of the imposition of the fee. Alternatively, the joint Petitioners suggest that the Commission act expeditiously on its reconsideration request.

[52] Section 318 of the Communications Act requires that persons operating the transmitting apparatus at, *inter alia*, broadcast stations, hold operator's licenses issued under the Act. 47 U.S.C. § 318. The Commission's rules require an RP for only those persons who are in charge of the transmitter during hours of operation. 47 C.F.R. § 1860(a).

[53] The legislative history of the 1985 Budget Act indicated that "noncommercial radio and television stations will not be subject to any of the fees listed in this schedule." H.R. Rep. No. 453, 99th Cong., 1st Sess. at 423. In considering the 1989 Budget Act, the Conferees agreed to continue to "exclude all noncommercial broadcasters from the schedule of charges." H.R. Rep. No. 386, 101st Cong., 1st Sess. at 434.

[54] With regard to NCE stations, the exemption created herein is tantamount to a grant of Harvard's request for a blanket waiver. However, there does not appear to be a similar policy justification to create a fee exemption, as requested by Harvard and Illini Media Company, for persons working at academically affiliated stations that are not also noncommercial educational stations.

[55] At an appropriate time in the future, we will consider adoption of an alternate version of FCC Form 753 for use by applicants who intend to use the permit at NCE stations. The certification would be included on that new application.

[56] Of course, any applicant who wishes to have an unrestricted license can simply pay the required fee when filing their application. Even permit holders who later wish to have an unrestricted license need only file a new application on Form 753 with the required fee in the normal manner.

[57] *See, e.g.*, FCC *Public Notices* entitled, "Fee Collection Program -- Further Clarifications," issued June 21, 1990, and "Workshop Scheduled on FCC Fees," issued June 19, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 91-280

In the Matter of

Amendment of Section 2.106 of	RM-7334
the Commission's Rules to	RM-7399
Allocate Spectrum to the Fixed-Satellite Service and the Mobile-Satellite Service for Low-Earth Orbit Satellites	RM-7612

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1991; Released: October 18, 1991

Comment Date: December 24, 1991
Reply Comment Date: January 23, 1992

By the Commission:

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I. INTRODUCTION

1. By this *Notice*, we propose to establish a low-Earth orbit (LEO) satellite service and to allocate for its operation the frequency bands 137-138, 148-150.05, 399.9-400.05 and 400.15-401 MHz. We believe it is feasible for LEO systems to utilize these relatively narrow segments of VHF and UHF spectrum to provide to consumers a variety of low cost data messaging and position determination services using small, portable personal radiocommunication units. Operation of these services is made possible by capitalizing on the low power requirements of LEOs and recent advances in launch vehicle and small satellite technology. This action is in response to petitions filed by Orbital Communications Corporation (ORBCOMM), STARSYS Inc. (STARSYS), and Volunteers in Technical Assistance (VITA) and is limited to "small" LEO satellite systems.[1]

II. BACKGROUND

2. LEO satellites are satellites that are not in geostationary orbit about the earth.[2] LEO satellites orbit the earth at altitudes generally in the order of 1000 to 2000 km (650-1300 miles). LEO satellites have been utilized primarily for military, scientific, and amateur radio communications purposes. The three petitioners propose to establish a new LEO service[3] for public civilian purposes that could offer improved capabilities, such as locating injured or lost hikers in the wilderness, lost or stolen vehicles, and automobile and truck accidents.[4] This service also might be used to locate and communicate with ships at sea.

[1] The Commission is considering LEO proposals as being within one of two distinct categories, "small" or "large." "Small" LEOs would utilize spectrum in the VHF/UHF bands, require relatively small amounts of spectrum (4 MHz or less), and provide non-voice services only, such as data messaging and position determination. "Large" LEOs would utilize spectrum above 1 GHz, require large amounts of spectrum (more than 16 MHz), and include voice communications. Five applicants propose to provide "large" LEO mobile-satellite services in the 1610-1626.5/ 2483.5-2500 MHz bands. Constellation Inc., TRW Inc., and Ellipsat Corporation have filed both petitions and applications. Motorola Corporation and Loral Globalstar Inc. have filed only applications and request a waiver of the Table of Frequency Allocations, 47 C.F.R. Section 2.106. The petitions for rule making and applications are pending. American Mobile Satellite Corporation has also filed a petition for rule making requesting that the Commission allocate the 1515-1525 MHz and 1616.5-1626.5 MHz bands for geostationary mobile-satellite services and an application to provide mobile-satellite services on these frequencies.

[2] A geostationary satellite's circular and direct orbit lies in the plane of the Earth's equator and remains fixed relative to the Earth. The distance to the Earth is approximately 35,785 km (22,235 miles).

[3] In the context of this NPRM, LEO satellite service refers to the allocations proposed herein for the fixed-satellite service and the mobile-satellite service which are limited to LEO satellites.

[4] ORBCOMM, a subsidiary of Orbital Sciences Corporation, was formed to develop the ORBCOMM LEO satellite system. ORBCOMM states that it has extensive experience in the design and construction of low-Earth orbiting satellites and space launch vehicles. ORBCOMM also has applied to construct a LEO satellite system, *see* Common Carrier Bureau, File No. 22-DSS-P90(20) (February 28, 1990). On June 3, 1991, ORBCOMM also submitted proposals for service rules in conjunction with its petition, but we are forbearing from addressing such rules at this time. STARSYS is affiliated with North American CLS, which operates the existing Argos LEO system. STARSYS also has filed an application to construct a lowEarth orbit satellite system, *see* Common Carrier Bureau, File No. 33-DSSP90(24) (May 4, 1990). Volunteers in Technical Assistance (VITA) is a U.S.-based non-profit charitable organization with more than thirty years of experience in providing technical assistance services to individuals and groups in developing countries. It also filed an application to construct a low-Earth orbit satellite system, *see* Common Carrier Bureau File No. CSS-91-007-(3) (September 20, 1990). All three petitioners have requested parallel processing of their applications with the petitions for rule making. Finally, an application to construct a

3. In its petition, ORBCOMM requests that we amend the Table of Frequency Allocations[5] to allocate 370 kHz in the 137-138 MHz band and 478 kHz in the 148-149.9 MHz band for a low-Earth orbit (LEO) mobile-satellite service (MSS). [6] As an alternative to 148-149.9 MHz, ORBCOMM requests frequencies in the 400.15-403 MHz range. ORBCOMM's proposed system would consist of 20 small satellites placed in circular orbits 970 kilometers above the earth. According to ORBCOMM, economical and spectrum efficient service can be provided due to advances in launch vehicle and small satellite technologies and because of the relatively low power requirements of satellite operations in low-Earth orbit compared with the power requirements of systems using geostationary satellites. It proposes to provide data messaging and position determination services to the United States and its possessions and eventually to provide world-wide coverage.[7]

4. STARSYS also requests establishment of a low-Earth orbit mobile-satellite service that would utilize a total of 2 MHz in the 137-138 and 148-149 MHz bands. It proposes a system that would consist of 24 spacecraft placed in low-Earth orbit at about 1,300 kilometers above the earth. STARSYS proposes to use spread spectrum modulation to provide both two-way data messaging and position determination services similar to the services proposed by ORBCOMM. Alternatively, if spread spectrum is not authorized, STARSYS supports the frequency allocation proposed by ORBCOMM.

5. VITA proposes a non-profit international low-Earth orbit fixedsatellite service that would be used on a humanitarian aid-related basis to provide educational, health, environmental, disaster relief, and other communication services intended to benefit recipients in developing countries. VITA seeks authority to use either a total of 210 kHz in the 137.69-137.75 and 400.15-400.3 MHz bands, or 190 kHz in the 149.81-149.9 and 400.15-400.25 MHz bands. VITA proposes two alternative technical schemes which, it states, are designed to co-exist with the proposals of the commercial applicants.

6. Comments in response to these petitions were received from over 40 parties, including representatives from service organizations, manufacturers, and mobile-satellite providers.[8] The commenters generally support using LEOs for data messaging and position determination services and suggest a number of practical applications for LEO satellite systems.

III. DISCUSSION

7. Based on the record in this proceeding, we tentatively believe that establishing a small LEO satellite service and allocating frequencies for its operation would be in the public interest. We agree with petitioners that a LEO satellite service can offer a wide variety of services and features at low cost. Also, the allocation of spectrum for a small LEO satellite service would be consistent with and closely track the U.S. proposals for the World Administrative Radio Conference that will convene in Spain in February, 1992 (WARC-92).[9]

8. There are a number of policy issues to be addressed in considering the establishment and the allocation of spectrum for a LEO mobile-satellite service. These include: 1) the need for these services; 2) spectrum requirements; 3) whether it would be possible to accommodate more than one LEO satellite service provider in the same spectrum; and 4) whether spectrum can and should be allocated separately for nonprofit LEO services as proposed by VITA.

A. Need for the Service

9. Although certain mobile-satellite services exist that are similar to those proposed by petitioners, the cost of these services provided by geostationary satellites is much higher than that projected by using LEOs. The benefits of using LEOs include the cost of launching LEOs into space, which is 20 times less expensive than launching satellites into geostationary orbit (although the life of a LEO is a little less than half that of a geostationary satellite due to the greater effects of gravity on low-Earth orbit satellites). Portable hand held receivers and antennas for use with LEOs also are expected to be inexpensive, perhaps as low as fifty dollars. When we weigh the advantages and disadvantages, the cost savings of LEOs appear appealing relative to geostationary systems for many data messaging and position determination services.

10. Needs that can be met by a LEO system include data messaging services, position determination, and combinations of these two services. Prominent among these is low-cost message signaling. The LEO service could utilize message signaling to monitor and control activities in the oil exploration and transport industry. Another possible use is research and monitoring, including remote monitoring of various climatic, oceanographic, or environmental areas. Substantial savings in time and money may be achieved by using LEOs for research monitoring at re-

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LEO system below 1 GHz was filed by LEOSAT, Inc. *See* Common Carrier Bureau File No. 12-DSS-P91 (October 12, 1990), proposing to provide messaging and smart car mobile-satellite services. These applications will be processed after this rule making is concluded.

[5] 47 C.F.R. Section 2.106.

[6] ORBCOMM also proposes to use the 400.075 to 400.125 MHz band to transmit time information and a standard frequency. This use accords with existing allocations, and therefore is not a subject of this *Notice*.

[7] ORBCOMM, STARSYS, and VITA each have applied for a pioneer's preference in this proceeding. *See Report and Order*, GEN Docket 90-217, 6 FCC Rcd 3488 (released May 13, 1991), petitions for reconsideration pending, which established procedures for providing a licensing preference to applicants that propose an allocation for a new service. *See also, Filing Requirements for Pioneer's Preference*, Public Notice issued June 13, 1991. Although our pioneer's preference rules provide for addressing these requests concomitantly with this *Notice*, the issues in this proceeding were pending before the pioneer's preference rules became effective on July 30, 1991. Because of our desire to adequately address comments on the preference requests we will separately consider the preference claims of the petitioners in a *Further Notice* in the near future.

[8] See Appendix A for a list of parties that provided comments or reply comments in this proceeding.

[9] See *Report and Order*, GEN Docket 89-554, 6 FCC Rcd 3900 (released June 20, 1991) at paragraphs 43-49. The Commission recommended that the United States propose an international allocation of 137-138/148-149.9/400.15-401.0 MHz for LEOs on a primary shared basis at WARC-1992.

mote sites. Additional non-commercial applications such as educational, health, and disaster relief have been identified as possible data messaging uses for LEO services.

11. The demand for position determination services includes industrial applications as well as non-profit and personal safety uses. Applications referred to in the petitions and comments include tracking and monitoring the location of cars, trucks, and ships. LEOs would permit a small transmitter to be activated to locate a stolen vehicle, an automobile in an accident, a ship lost at sea, or a cargo ship or train in transit. In similar fashion, hikers in the wilderness might use inexpensive transmitters that would permit monitoring and rescue efforts in cases of unforeseen difficulty.

12. Some applications such as search and rescue operations, would utilize a combination of the data messaging and position determining capabilities of LEOs. For example, a lost hiker could initiate notification of his predicament using the data messaging capability and could be located using the position determining function. Current communications equipment used by hikers consists of fixed channel VHF radios operating on public service radio frequencies that are insufficient because line of sight transmissions are difficult to maintain and communications are often lost due to dead zones caused by terrain. Communications through LEO satellite systems would not encounter these problems.[10]

13. Based on the information provided in the petitions and the responses thereto, we believe that there is significant unmet need for low-cost data messaging and position determination services that could be met by a LEO satellite source. The vast majority of comments received in response to these petitions indicate that a LEO service as described by the petitioners is desirable and viable. We believe that this service can be integrated into the existing market and help fill the large demand for satellite communications services. This conclusion is further buttressed by the interest expressed by the petitioners, each of which is willing to develop a LEO system and provide service, and by the potential users and others that submitted comments.

14. Accordingly, we believe a proposal to establish a LEO satellite service is warranted. This proposal tracks our recommendations for WARC-92. We request comment on the extent to which the proposed LEO services could be met through the facilities of other existing services. To the extent feasible, commenters should specifically address demand for specific services, projected costs for those services, and the benefits and costs of providing these services by LEOs compared with geostationary satellites or other means.

B. Spectrum Issues

15. We tentatively conclude that up to 4 MHz of spectrum is needed in the VHF/UHF bands to accommodate a domestic satellite service utilizing LEOs and propose to allocate 137-138, 148-150.05, 399.9-400.05, and 400.15-401 MHz for this purpose. Although each petitioner's proposal differs in some respects, each argues that spectrum in the VHF and UHF bands is the most appropriate for LEOs due to suitable propagation characteristics, the low cost of equipment, and the feasibility of sharing these frequencies without displacing current users. ORBCOMM states its requirements for approximately 900 kHz using a frequency division multiple access (FDMA) modulation scheme. STARSYS proposes to use 2 MHz, but would utilize spread spectrum modulation that could accommodate competitive providers on the same frequencies. However, STARSYS alternatively requests the same spectrum as ORBCOMM if its spread spectrum proposal is rejected. VITA requests only about 200 kHz to provide "store and forward" communications with locations mostly in Africa and Asia, and could use either modulation scheme. The only alternative to these VHF/UHF bands would be to use spectrum above 1 GHz. However, petitioners argue that using spectrum above 1 GHz is not desirable due to the propagation characteristics of these higher frequencies and associated higher equipment cost.

16. *The 137-138 MHz Band.* We have examined the 137-138 MHz band to determine its suitability for LEO communications and the potential impact on existing users. During preparation of our WARC-92 recommendations we noted concerns regarding use of these frequencies for LEOs. The band currently is allocated worldwide on a primary basis to the Space Operation, Meteorological Satellite, and Space Research services (space-to-Earth).[11] Although we believe sharing with these other geostationary and non-geostationary satellites on a continuous global basis may be possible, the mechanics for that sharing have not been fully developed. Therefore, we request detailed technical analysis of the design aspects of each proposed LEO system relevant to its potential to cause interference to or receive interference from the existing users in the 137-138 MHz band.

17. We seek comment on our proposal to allocate the 137-138 MHz band to the mobile-satellite and fixed-satellite service for space-to-Earth communications by small low-Earth orbit operations. In this regard we note that LEOs use lower power than geostationary satellites and consequently are less likely to cause interference to existing government operations. We additionally propose that until January 1, 2000, use of this band for LEOs be secondary to government operations within the following frequency ranges: 137.333-137.367, 137.485-137.515, 137.605-137.635 and 137.753-137.787 MHz. Finally, we propose to include new footnotes in the Table of Frequency Allocations that limit the mobile-satellite and fixed-satellite (space-to-Earth) service at these frequencies to LEOs on a secondary basis to the meteorological-satellite (space-to-Earth) services operating at 137.025-137.175 and 137.825-137.975 MHz. The purpose of these conditions is to protect operations currently using these frequencies, and result from discussions with the National Telecommunications and Information Administration (NTIA) and other federal agencies.

18. *The 148-150.05 MHz Band.* As with the 137-138 MHz band, we solicit comment on the practicality of LEOs sharing the 148-149.9 MHz band. In addition to

[10] This NPRM proposes to allocate spectrum to generic LEO services that could include public safety applications (fixed-satellite and mobile-satellite) but does not propose to allocate spectrum exclusively for safety services.

[11] There currently are 27 non-geostationary satellites and 16 geostationary satellites identified as operating in this band by ITU Publication List VIIA of Stations in the Space Radiocommunications Services and in the Radio Astronomy Service (March 1990). These satellites are used for space operation, meteorological information gathering and space research.

satellite systems, [12] the 148-149.9 MHz band also is used by both government and non-government fixed and mobile services on a primary basis. The petitions do not adequately address the constraints required to share this band for Earth-to-space links on a co-primary basis with these users. As a result of discussions with NTIA and other federal agencies, we propose the following guidelines to protect existing users from interference. First, we propose to limit use of 148-149.9 MHz in the mobile-satellite and fixed-satellite service (Earth-to-space) to LEOs and to subject this use to the following conditions: 1) LEO operation does not constrain operation of the fixed and mobile services; 2) LEOs be designed to accept all signals into the satellite from the fixed and mobile systems; 3) LEO earth stations either avoid channels being used by the fixed and mobile services, or limit their spectral power density; 4) LEO transmissions be short bursts of 150 milliseconds or less and employ a low duty cycle;[13] and 5) LEOs be limited to nonvoice services. We seek comment on the benefits of avoiding channels being used compared with limiting spectral power density; and on what spectral power density levels would provide the required protection. More generally, we seek comment on the feasibility of LEOs complying with these technical requirements, and on additional or alternative requirements that might be necessary to prevent interference with other users.

19. In addition, we note that the Department of Defense (DOD) uses 149.9-150.05 MHz for the radionavigation satellite "TRANSIT-SAT". Since "TRANSIT-SAT" is expected to cease operation in December, 1996, we propose that 149.9-150.05 MHz be allocated for LEOs on a primary basis after January 1, 1997.

20. *The 399.9-401 MHz Band.* We note that operation on the 399.9-400.05 MHz band by the "TRANSIT-SAT" radionavigation satellite, is expected to cease in December, 1996, *supra*. Therefore, this band will also be available after that time and we seek comment on its possible use by LEOs. We also seek comment on use of 400.15-401 MHz band by LEOs. Such use closely tracks our recommendations for WARC-92.[14] Although ORBCOMM also requests frequencies at 401-403 MHz, we believe that 399.9-400.05 and 400.15-401 MHz, in conjunction with the bands discussed above, will provide spectrum sufficient to accommodate one or more LEO licensees.[15]

21. In conclusion, we are proposing to allocate 137-138 MHz, 148-150.05 MHz, 399.9-400.05 MHz and 400.15-401 MHz for LEOs, subject to the conditions specified above. We are proposing more spectrum than has been requested by any one of the petitioners. This is due to the availability of bands now used by the "TRANSIT-SAT"; to our desire to accommodate competing LEO satellite systems; and to account for the restrictions on sharing in some of the proposed bands. This proposal for a domestic allocation for LEOs is also slightly broader than our WARC-92 recommendations because we learned only recently that the "TRANSIT-SAT" frequencies will be available.

C. Additional Matters

22. Based on discussions with various federal agencies that operate in these bands, there remain several questions with regard to spectrum sharing between LEOs and existing services. We seek comment on the specific constraints that may be necessary for LEOs to share these bands. Specifically, we seek comment on allocating this spectrum for LEOs, the relative advantages and disadvantages of using FDMA versus spread spectrum, the interference potential associated with these proposals, and other spectrum alternatives that might be suitable for provision of the above-described LEO satellite services. We also seek comment on additional coordination and sharing requirements that might be necessary for these LEO services to use the proposed channels.

23. Unlike STARSYS and ORBCOMM, VITA proposes a fixed, rather than mobile, satellite service. It appears that its proposal for a limited data messaging system is compatible with either of the other two, and because of its limited nature, we believe it can be accommodated. We tentatively conclude that providing spectrum for non-commercial, humanitarian operations as proposed by VITA is desirable and would be in the public interest. We seek comment on accommodating VITA's request for a limited fixed satellite service (FSS) allocation, and on whether its technical proposal can be accommodated by each of the other proposed commercial systems. We specifically are interested in any effect upon the others' capacity that would result from operation of the parallel system proposed by VITA.

24. We also request comment on whether a commercial LEO licensee is likely to offer LEO services to non-profit organizations at lower cost than a non-commercial LEO licensee could independently develop its own system. Therefore, in conjunction with comments on VITA's proposal and its likely effect on any commercial system, we also seek comment on whether a separate allocation for non-commercial LEOs should be established or whether a general LEO allocation is sufficient to meet the needs of both commercial and non-commercial users.

25. We intend to provide for multiple operators of LEO systems. A primary issue in this regard is the type of modulation that will be utilized. STARSYS claims that multiple service providers would be possible within the same spectrum if its proposed spread spectrum concept is adopted. ORBCOMM disputes the claims made by STARSYS and argues that the proposed STARSYS system will be unworkable. ORBCOMM proposes to utilize FDMA modulation on a total of 848 kHz, and states that it has no objections to other LEO satellite systems if they do not cause interference to its system.[16] However, neither

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[12] In the 148-149.9 MHz band, ITU Publication List VIIA identifies 30 non-geostationary satellites and 17 geostationary satellites.

[13] We seek comments on the specific duty cycle that should be required if this condition is adopted in the final rule.

[14] *See* note 9, *supra*.

[15] With respect to the proposed allocation of 399.9-400.05 and 400.15-401.0 MHz, there is no intention of using these allocations in a bi-directional mode of operation. Both direction indicators are listed in Appendix B to provide the Commission the flexibility necessary to process the applications, which propose to use a particular allocation either as an uplink or a downlink to be compatible with other systems.

[16] *See* ORBCOMM Reply Comments to its petition, RM-7334 (May 22, 1990).

ORBCOMM nor any other party has submitted information that addresses how multiple systems could best be accommodated in the same spectrum. Therefore, at this time we are not prepared to take a position as to whether a spread spectrum system using the full 137-138/148-149 MHz band is more desirable than a system using FDMA in a portion of the proposed bands. However, we request comment on the competitive advantages and disadvantages of requiring spread spectrum or FDMA modulation for this service and on any other possible modulation schemes or technology that would assist us in providing for a competitive LEO service in the spectrum proposed.

IV. CONCLUSION

26. In response to the three petitions for rule making discussed above, we propose to establish a mobile-satellite/fixed-satellite service limited to low-Earth orbit satellites and to allocate for this service 137-138 MHz, 148-150.05 MHz, 399.9-400.05, and 400.15-401 MHz. Based upon the perceived need in the record for data messaging and position determination services and upon the apparent willingness of these petitioners to invest in LEO technology, we tentatively conclude that there is a viable market for the services and that providing for these needs would be in the public interest. We expect that this service would make available to the American public additional communication services at significantly less cost than currently available. We invite comment on these assessments, on the issues specified above, and on any other issues relevant to the allocation of spectrum for this purpose.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

27. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds as follows:

A. Reason for Action

This action is being initiated to provide an allocation for a low-Earth orbit satellite service. We believe that there is a need for additional spectrum for mobile and fixed satellite services for data messaging and position determination services and that LEOs offer a cost effective means to accommodate this need. We also intend to protect existing users if spectrum is allocated for an LEO satellite service.

B. Objective

The objective of this proposal is to promote efficiency in the allocation of spectrum for meeting the public's requirements for low-cost data messaging and positioning services. This objective can be met by establishing the low-Earth orbit satellite service. Providing for the development of LEO technology in the United States also will promote the provision of these satellite services by U.S. firms.

C. Legal Basis

The proposed action is authorized by Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r). These provisions authorize the Commission to make such rules and regulations as may be necessary to encourage more effective use of radio as is in the public interest.

D. Description, Potential Impact, and Number of Small Entities Affected

This proposal may provide new marketing opportunities for radio manufacturers, some of which may be small businesses. Because this proposal concerns only the allocation of spectrum, and not the licensing of systems or stations, we are unable to quantify other potential effects on small entities. We invite specific comments on this point by interested parties.

E. Reporting, Record Keeping and other Compliance Requirements

None.

F. Federal Rules which Overlap, Duplicate or Conflict with this Rule

None.

G. Significant Alternatives

If promulgated, this proposal will allow mobile-satellite and fixed-satellite services to share spectrum, on a co-primary basis, with the government fixed and mobile and the space operations services. We are proposing only a spectrum allocation at this time. Specific technical standards, rules, and regulations will be determined in future proceedings.

VI. PAPERWORK REDUCTION ACT

28. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements, and will not increase or decrease burden hours imposed on the public.

VII. PROCEDURAL INFORMATION

29. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. Section 1.1203.

30. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if

oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. Section 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R. Section 1.1206.

31. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation, 47 C.F.R. Section 1.1206.

32. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r).

33. Pursuant to applicable procedures set forth at 47 C.F.R. Sections 1.415 and 1.419, of the Commission's Rules, interested parties may file comments on or before **December 24, 1991** , and reply comments on or before **January 23, 1992.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

34. For further information concerning this rule making contact Mr. Raymond LaForge at (202) 653-8117, Office of Engineering and Technology, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Comments to the ORBCOMM Petition for Rule Making

AeroAstro Corporation
American Mobile Satellite Corporation
Ford Motor Company
Geostar Corporation
L-Tronics
Maxon
Mitsubishi
NEC America, Inc.
North American CLS
OTC Limited
Portland Mountain Rescue
Public Service Satellite Consortium
SCI Technology, Inc.
Sierra Madre Search and Rescue Team
Southern Marine Research
The Virginia Center for Innovative Technology
Volunteers in Technical Assistance, Inc.

Parties Filing Reply Comments to the ORBCOMM Petition for Rule Making

ORBCOMM
STARSYS

Parties Filing Comments to the STARSYS Petition for Rule Making

Geostar Corporation
Houston Data Transmission Company
MicroSat Launch Systems, Inc.
Natural Resources Consultants, Inc.
ORBCOMM
Polar Science Center, Applied Physics Laboratory, College of Ocean and Fishery Sciences, University of Washington
R. Dale Pillsbury
Southwest Research Institute
The Inter-American Tropical Tuna Commission
The Volunteer Observing Ship Program, Scripps Institution of Oceanography, University of California, San Diego

Parties Filing Reply Comments to the STARSYS Petition for Rule Making

ORBCOMM
STARSYS

Parties Filing Comments to the VITA Petition for Rule Making

Center for Information Systems and Research

Clearinghouse on Development Communication

Foster Parents Plan International

Helen Keller International

International Voluntary Services, Inc.

New TransCentury Foundation, Inc.

ORBCOMM

National Association of Partners of the Americas

Private Agencies Collaborating Together

Public Service Satellite Consortium

SATELLIFE

Save the Children

United Nations Development Programme

The U.S. Agency for International Development, Center for Development Information and Evaluation

The U.S. Agency for International Development, Office of the Science Advisor

The University of Massachusetts, Renewable Energy Research Laboratory

YMCA of the USA, International Division

Parties Filing Reply Comments to the VITA Petition

Volunteers in Technical Assistance, Inc.

APPENDIX B

RULE CHANGE

I. Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 -- FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations is amended as follows:

a. Add a new Footnote US318 to columns 4 and 5 of the band 137.0-138.0 MHz.

b. Add a new Footnote US 319 to columns 4 and 5 of the band 149.9-150.05 MHz.

c. Add a new Footnote US320 to columns 4 and 5 of the band 148.0-149.9 MHz.

d. Add mobile-satellite and fixed-satellite services primary allocations to columns 4 and 5 for the 137-138 MHz, 148.0-149.9 MHz, 149.9-150.05 MHz, 399.9-400.05 MHz and 400.15-401.0 MHz bands.

e. Add a new footnote US321 to columns 4 and 5 of the band 399.9-400.05 MHz.

f. Add a new footnote US322 to columns 4 and 5 of the band 400.15-401 MHz.

Section 2.106 Table of Frequency Allocations

* * * * *

International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		*
137.0-138.0	SPACE OPERATION (space-to-Earth). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth). Fixed. Mobile except aeronautical mobile (R). 596 597 598 599		137.0-138.0 SPACE OPERATION (space-to-Earth). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth). MOBILE-SATELLITE (space-to-Earth). FIXED-SATELLITE (space-to-Earth). US318	137.0-138.0 SPACE OPERATION (space-to-Earth). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth). MOBILE-SATELLITE (space-to-Earth). FIXED-SATELLITE (space-to-Earth). US318	SATELLITE COMMUNICATION (25).	
*	*	*	*	*		*

International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		*
	148.0-149.9 FIXED. MOBILE. (Earth-to-space)		148.0-149.9 FIXED. MOBILE. MOBILE-SATELLITE (Earth-to-space). FIXED-SATELLITE (Earth-to-space).	148.0-149.9 MOBILE-SATELLITE (Earth-to-space). FIXED-SATELLITE	SATELLITE COMMUNICATION (25).	
608	608		608 US10 US320 G30	608 US10 US320		
149.9-150.05	RADIONAVIGATION-SATELLITE.		149.9-150.05 RADIONAVIGATION-SATELLITE. MOBILE-SATELLITE (Earth-to-space). FIXED-SATELLITE (Earth-to-space).	149.9-150.05 RADIONAVIGATION SATELLITE. MOBILE-SATELLITE (Earth-to-space). FIXED-SATELLITE (Earth-to-space).		
	609 609A		609A US319	609A US319		
*	*	*	*	*		*

International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		*
399.9-400.05	RADIONAVIGATION-SATELLITE. 609 645B		399.9-400.05 RADIONAVIGATION-SATELLITE. MOBILE-SATELLITE (space-to-Earth) (Earth-to-space). FIXED-SATELLITE (space-to-Earth) (Earth-to-space). 645B US321	399.9-400.05 RADIONAVIGATION-SATELLITE. MOBILE-SATELLITE (space-to-Earth) (Earth-to-space) FIXED-SATELLITE (space-to-Earth) (Earth-to-space) 645B US321		
*	*	*	*	*		*

International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		*
400.15-401.0	METEOROLOGICAL AIDS. METEOROLOGICAL-SATELLITE (space-to-Earth) SPACE RESEARCH (space-to-Earth) Space Operation (space-to-Earth) 647		400.15-401.0 METEOROLOGICAL AIDS (radiosonde). METEOROLOGICAL-SATELLITE (space-to-Earth). Space Operation (space-to-Earth). MOBILE-SATELLITE (space-to-Earth) (Earth-to-space) FIXED-SATELLITE (space-to-Earth) (Earth-to-space). US70 US322	400.15-401.0 METEOROLOGICAL AIDS (radiosonde) SPACE RESEARCH (space-to-Earth) Space Operation (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) (Earth-to-space) FIXED-SATELLITE (space-to-Earth) (Earth-to-space) US70 US322	SATELLITE COMMUNICATION (25).	
*	*	*	*	*		*

US FOOTNOTES FOR ILLUSTRATIONS

US318 The mobile-satellite (space-to-Earth) and the fixed-satellite (space-to-Earth) services in the 137-138 MHz band are limited to low-Earth orbit (LEO) satellite operations. Until January 1, 2000, use of this band for LEO satellites will be secondary to the U.S. government operations within the following frequency ranges: 137.333-137.367, 137.485-137.515, 137.605-137.635 and 137.753-137.787 MHz. The mobile-satellite (space-to-Earth) and the fixed-satellite (space-to-Earth) services at these frequencies are on a secondary basis to the meteorological-satellite (space-to-Earth) service operating at 137.025-137.175 and 137.825-137.975 MHz.

US319 The 149.9-150.05 MHz band may be used for low-Earth orbit mobile-satellite (Earth-to-space) and fixed-satellite (Earth-to-space) services after December 31, 1996.

US320 Use of the 148-149.9 MHz band for mobile-satellite (Earth-to-space) and fixed-satellite (Earth-to-space) services is limited to low-Earth orbit (LEO) satellite systems and subject to the following conditions: 1) LEO operations shall not constrain operation of the fixed and mobile services; 2) LEOs shall be designed to accept all signals into the satellite from the fixed and mobile systems; 3) to preclude interference to terrestrial stations operating in accordance with the Frequency Allocation Table, the LEO earth stations shall avoid channels being used by the fixed and mobile services, or limit their spectral power density; 4) the transmissions will be short bursts of 150 milliseconds or less and have a low duty cycle; and 5) the LEOs shall be limited to non-voice services.

US321 The 399.9-400.05 MHz band may be used for low-Earth orbit mobile-satellite (Earth-to-space and space-to-Earth) and fixed-satellite (Earth-to-space and space-to-Earth) services after December 31, 1996.

US322 The mobile-satellite service (space-to-Earth and Earth-to-space) and the fixed-satellite (space-to-Earth and Earth-to-space) services in the 400.15-401 MHz band are limited to low-Earth orbit (LEO) operations.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-126

In re Applications of

DARRELL SPANN — File No. BR-881003YH
For Renewal of License of
Station WSVE
Jacksonville, FL

SPICECOM BROADCASTING, INC. — File No. BR-890103AC

For Construction Permit for
New AM Station Jacksonville, FL

MEMORANDUM OPINION AND ORDER

Adopted: October 7, 1991; Released: October 18, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE

1. Darrell Spann and Spicecom Broadcasting, Inc., the two applicants in this comparative renewal proceeding, have appealed the *Memorandum Opinion and Order* of Administrative Law Judge Edward J. Kuhlmann that dismissed both of their applications and terminated the proceeding. FCC 91M-2068 (released July 5, 1991). The appeals were filed under 47 C.F.R. § 1.302. For the reasons given below, the Spann appeal will be granted, but the Spicecom appeal will be denied.

BACKGROUND

2. Willis & Sons, Inc., the former licensee of Station WSVE (AM), Jacksonville, Florida, timely filed for renewal of license in October 1988, and four months later Spicecom filed a competing application for the frequency. In October 1989, Willis and Spann closed on the earlier approved assignment of license of Station WSVE to Spann (BAL-870226EB). Counsel for Willis advised the Commission of the closing, and Spann filed an ownership report on December 23, 1989, giving the Commission his name and address as owner of WSVE.

3. The Mass Media Bureau designated Spann's renewal and Spicecom's construction permit applications for comparative hearing and also designated financial and site availability issues against Spicecom. *Hearing Designation Order*, 6 FCC Rcd 2596 (released May 23, 1991). In the *HDO* the Bureau gave the parties twenty days to submit their notices of appearance. Hearing fees were due at the same time. On June 21, after the twenty day period had expired, Spicecom filed a Petition to Dismiss its application. The ALJ granted this petition in his July 5, 1991, order, and also dismissed Spicecom's application because Spicecom had not filed a notice of appearance or paid the hearing fee. In the same order, the ALJ dismissed Spann's application for failing to file an appearance and the required fee. Spicecom filed a Notice of Appeal on July 18. On August 5, Spann filed a Notice of Appearance, a Motion to Accept Notice of Appeal, and a Notice of Appeal. Both applicants filed appeals on August 7, and Spann supplemented his appeal on August 16. Spicecom opposed Spann's Motion to Accept Notice of Appeal but did not oppose the appeal itself. The Mass Media Bureau supported Spann's appeal. The Bureau and Spann opposed Spicecom's appeal.

4. Both Spann and Spicecom are seeking reinstatement of their applications: Spann, to preserve an operating station; and Spicecom, to offer a replacement for Spann's dismissed application. Spann additionally argues that he never received notice of the *HDO* from the Commission and, indeed, was unaware of the hearing until counsel for Willis advised him of the ALJ's dismissal order. He also argues that, as an operating licensee seeking renewal, he should not have been treated so cavalierly.

DARRELL SPANN APPEAL

5. Spann filed his Notice of Appeal on August 5, 1991, well after the ten day period provided in section 1.302(b) of the Commission's Rules, 47 C.F.R. § 1.302(b), to preserve the right to appeal, and he filed a Motion to Accept Notice of Appeal on the same day. He says through counsel that two other law firms advised him of the deadline for appealing the ALJ's order but that neither mentioned the requirement that he precede his appeal with notice of his intent. Excerpts from the letters of the two law firms are attached to Spann's motion. Spann further argues that denial of his renewal application for an operating station solely on procedural grounds would be harsh and contrary to the public interest. The Bureau has supported this motion, but Spicecom has opposed it on the ground that Spann cannot pass the blame for his footdragging to counsel with whom he has consulted, particularly since Spann's underlying problem in this case is his failure to meet procedural deadlines.

6. The uncontroverted facts show that Spann did not receive notice of hearing designation from the Commission. Although he had advised the Commission of his name and address as the new owner of WSVE, the Commission's address list for this proceeding gave Willis' Norfolk, Virginia, address for Spann and listed as counsel the attorney who represents Willis. Willis' attorney received a copy of the *HDO*. Because he did not represent Spann and did not know who did, he sent a copy of the *HDO* to an attorney whom he knew had represented Spann's father in another matter. Another attorney in that firm, in turn, sent a copy to an Atlanta address she had pursuant to a reinstatement application she had filed for Spann for another station, but that station had vacated the Atlanta address before the *HDO* was issued. Spann filed a sworn declaration that no copy of the *HDO* had reached him, and the WSVE manager in Jacksonville declared under oath that no *HDO* or related document had been received at the station. In fact, Spann only learned of the release of the *HDO* after the release of the dismisssal order.

7. Apparently, the ALJ's dismissal order was also misdirected. On July 9, four days after the ALJ issued his order, counsel for Willis sent Spann a copy of the order at WSVE's Jacksonville address. In his cover letter, the attorney advised Spann of the seriousness of the order and the need to file an appeal by August 5. The WSVE manager received the letter and read it to Spann over the

telephone some time between July 10 and 12 and, at Spann's request, on July 15 or 16 sent a copy to the attorney who had earlier mailed a copy of the *HDO* to Spann in Atlanta. That attorney acknowledged receipt in a letter dated July 18, the date Spann's notice of intent to appeal was due.

8. Although we agree with Spicecom's general proposition that applicants are not immunized from sanctions merely because they follow the advice of counsel[1] - or proceed *pro se* [2] - we would be elevating form over substance in this case if we were to refuse to consider the merits of Spann's appeal because of the lateness of his notice of appeal. The appeal itself was timely, and the parties have not been prejudiced by Spann's untimely notice. Furthermore, the record does not support any finding of intractable conduct on Spann's part that would warrant the Board's refusal to even consider his arguments as to why his renewal application should not have been dismissed for procedural reasons. We will waive the notice requirement of section 1.302(b) and proceed with a discussion of the merits of his appeal. *See generally Carroll, Carroll & Rowland*, 4 FCC Rcd 7149, 7150 ¶ 7 (Rev. Bd. 1989) (Board waived 10 day notice of appeal requirement), *rev. denied*, 5 FCC Rcd 2430 (1990); *Denair Broadcasting Co., Inc.*, 49 R.R. 2d 1249, 1250 n. 1 (Rev. Bd. 1981) (same). *Compare John Jones, Jr.*, 3 FCC Rcd 2446 (Rev. Bd. 1988).

9. In reviewing Spann's dismissal from the comparative proceeding, we have considered the factors set forth in *Comuni-Centre Bl casting, Inc. v. FCC*, 856 F.2d 1551, 1554 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989), *i.e.*, his profferred justification for his failure to comply with the *HDO*, the prejudice suffered by the other parties, the burden placed on the administrative system, and the need to punish abuse and deter future misconduct. Spann's justification is a simple - and a compelling - one. He failed to comply with the procedural requirements of the *HDO* because the Commission failed to send him a copy of the *HDO*. [3] According to Spann, his first notice of the proceeding was the letter from counsel for the former WSVE licensee advising him of the ALJ's dismissal order.

10. There is no doubt that the Commission failed to give Spann notice of the *HDO*, and Spann appears to have learned of the ALJ's dismissal order from a third party rather than from the Commission. Although constructive notice of the hearing was published in the *Federal Register*, 56 Fed. Reg. 24816 (May 31, 1991), the Commission had an obligation to give Spann actual notice under both 47 U.S.C. § 309(e) and the Commission's implementing regulation in 47 C.F.R. § 73.3593. Both provide that the Commission must designate for hearing any application it cannot grant and it must "forthwith notify the applicant ... of such action and the grounds and reasons therefor." The Administrative Procedure Act further provides that persons entitled to notice shall be timely informed of the hearing and the issues. 5 U.S.C. § 554(b).

11. There is also no doubt that Spann was prejudiced by the Commission's error. *See Gardner v. FCC*, 530 F.2d 1086, 1091 and n. 24 (D.C. Cir. 1976). If he had been served with the *HDO*, he would have known of the deadline for filing a notice of appearance and the hearing fee in time to comply with the requirement. It was his failure to comply with this deadline that led to the ALJ's dismissal order. *Cf. St. Croix Wireless Co.*, 3 FCC Rcd 4073 ¶ 7 (1988) ("Where the Commission failed to adhere to its usual service procedures, we cannot fault [the applicant] for failing [to proceed] in a more timely fashion."), *recon. denied*, 5 FCC Rcd 4564 (1990).

12. On the other hand, we do not see how Spicecom was prejudiced. It suffered no inconvenience and was not handicapped in prosecuting its application by Spann's failure to give timely notice of its appearance and pay its hearing fee. Indeed, Spicecom was uninterested enough in participating that it failed to file its notice or pay its fee and, instead, filed a Petition to Dismiss its application. We also do not see how Spann has placed any burden on the administrative system since his failure to meet the deadlines was due to the Commission's error rather than disregard for procedural requirements on his part. *Compare Juan Galiano*, 5 FCC Rcd 6442 (1990), *recon. denied*, 6 FCC Rcd 895 (1991); *Silver Springs Communications*, 3 FCC Rcd 5049 (Rev. Bd. 1988), *rev. denied*, 4 FCC Rcd 4917 (1989). Under the circumstances here, there is no need to discipline Spann to preserve the integrity of the Commission's processes.

13. One further matter must be resolved. Spann has filed a limited notice of appearance and still has not paid the hearing fee required by the *HDO*. He has expressed his willingness to do so if necessary, but has asked for a ruling that the fee is not necessary in this case since the only other applicant failed to file its appearance or hearing fee and had asked to withdraw its application. Spann points out that, if he had timely paid his fee, he would be entitled to a refund under 47 C.F.R. § 1.1111(c), which provides for refunds when only one applicant in a comparative proceeding files a notice of appearance and pays the fee. The Bureau, on the other hand, recommends that Spann's application should be reinstated and granted only after Spann pays the hearing fee and a late charge of twenty-five percent of the amount due as provided by 47 C.F.R. § 1.1114.

14. The Board does not have authority to act on Spann's request for a ruling about the fee or determine whether the late charge is due in this case. *CSJ Investments, Inc.*, 5 FCC Rcd 7653 (1990); *Sam Widge Advertising*, FCC 91R-76 (Rev. Bd., released Sept. 9, 1991). Spann's request should have been sent to the Managing Director who, with the concurrence of the General Counsel, has delegated authority to act on these issues.[4] 47 C.F.R. § 1.1115(c). Consistent with the Commission's reminder in *CSJ Investments* at 7655 n. 4, we are referring a copy of Spann's August 7, 1991, Appeal to the Managing Director so that he can resolve the fee question raised on page 5 at note 7.[5]

15. We are reinstating Spann's application for renewal of the license for Station WSVE and, in light of the action we are taking on Spicecom's appeal, are granting Spann's renewal subject to the condition that he timely pay any fees and late charges determined by the Managing Director to be due in this case. 47 C.F.R. § 1.1110(a) provides that any instrument of authorization will be conditioned on final payment of the applicable fee and timely payment of bills issued by the Commission. If timely payment is not made, the Commission will rescind the authorization for the station. 47 C.F.R. § 1.1110(b).

SPICECOM BROADCASTING, INC. APPEAL

16. Spicecom, which filed its Notice of Appeal on July 18 and its Appeal on August 7, 1991, has asked for reinstatement of its application "[b]ecause Spann failed to show any interest in the renewal of his license." Spicecom Appeal at 1. Spicecom expresses concern that WSVE's service will be lost to Jacksonville because of the dismissal of Spann's renewal application, and it states its willingness to provide a broadcast service in place of WSVE. It further states its willingness to meet the financial and site availability qualifications issues designated against it in the *HDO*, but it has not tendered the notice of appearance required by the *HDO* or the hearing fee required by 47 U.S.C. § 158 and 47 C.F.R. §§ 1.1104 2.c., 1.1107, or timely sought a waiver or deferral of the fee, and it has not even stated its willingness to do so. This failure to tender the notice or pay the fee was one of two reasons that the ALJ correctly dismissed Spicecom's application. The other was that Spicecom had asked for dismissal.

17. The *HDO* clearly provided that, in order to prosecute its application, Spicecom was to file the notice of appearance within twenty days of the mailing of the *HDO*. 47 C.F.R. § 1.1107 requires that the fee accompany the notice. Spicecom, instead, chose to file its Petition to Dismiss a few days after the notice and fee were due. Although it now asserts an interest in the frequency, it has not offered any good cause explanation for its failure to give notice or pay the fee when it again changed its mind about seeking this frequency.[6] As the Commission made clear in *Establishment of a Fee Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 2 FCC Rcd 947, 957 ¶ 62 (1987), *modified and clarified*, 3 FCC Rcd 5987 (1988), and reiterated in *CSJ Investments*, 5 FCC Rcd at 7654 ¶ 10, payment of the prescribed fee is a precondition of the applicant's use of the regulatory process and failure to pay the fee is a basis for outright dismissal of an application.

18. Indeed, Spicecom appears to have conditioned its continued participation on the the lack of any competing applicant. Its only stated reason for seeking reinstatement is the ALJ's dismissal of Spann's application. Our reinstatement of Spann's application eliminates any need for Spicecom's application to preserve existing service in Jacksonville and it leaves us without any assurance that Spicecom would participate if reinstated. To permit Spicecom to energize its application only when it is convinced it will have no competition for the channel would be to condone an abuse of the Commission's comparative hearing processes. *See Silver Springs Communications*, 3 FCC Rcd at 5050 ¶ 7.[7]

19. ACCORDINGLY, IT IS ORDERED That the Appeal filed August 7, 1991, by Darrell Spann IS GRANTED; that its application (File No. BR-881003YH) for renewal of license of Station WSVE(AM) IS REINSTATED and IS GRANTED ON CONDITION that Darrell Spann timely pay any fee determined by the Managing Director to be due in this proceeding; and

20. IT IS FURTHER ORDERED That a copy of the Appeal filed August 7, 1991, by Darrell Spann IS REFERRED to the Managing Director for a ruling on the fee question; and

21. IT IS FURTHER ORDERED That the Appeal filed August 7, 1991, by Spicecom Broadcasting, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

FOOTNOTES

[1] *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986); *Carroll, Carroll & Rowland*, 4 FCC Rcd 7149 (Rev. Bd. 1989); and *Vela Broadcasting Co.*, 102 FCC2d 997 (Rev. Bd. 1985), cited by Spicecom, involve more serious problems than the untimely filing of a notice of appeal by a party who had not received notice of the proceeding from the Commission.

[2] *See, e.g., CSJ Investments, Inc.*, 5 FCC Rcd 7653 (1990).

[3] In a footnote Spann also argues that the ALJ abused his discretion by dismissing the renewal application of an operating station without requesting information and comment from Bureau counsel. Spann assumes that such a request would have resulted in contact with the station and correction of the notice of appearance problem. In light of the action being taken herein, there is no need for the Board to consider whether it should or should not advise the ALJ how to exercise his discretion in such situations.

[4] We also remind Spann of the requirement in 47 C.F.R. § 1.44(c) that requests for action by different officials pursuant to their separate delegated authority shall not be combined in a single pleading. Because Spann failed to apply for a ruling on the fee question directly to the Managing Director, his notice of appearance could have been rejected under 47 C.F.R. § 1.1107(b), which provides for dismissal of filings not accompanied by the required fee. Applicants are accountable for observing the Commission's published rules and regulations, and failure to follow them could result in adverse action.

[5] Spann may wish to supplement this pleading.

[6] Even if Spicecom were the sole remaining applicant at the point when the notice of appearance and hearing fee were due, its fee would not be refundable because of the outstanding, unresolved qualifying issues against it. 47 C.F.R. § 1.1111(c)(2); *Establishment of a Fee Collection Program*, 3 FCC Rcd 5987, 5990 ¶ 27 (1988). Spicecom's expressed willingness to meet its burdens under the qualifying issues is not accompanied by any showing of how it expects to meet them.

[7] The cases cited by Spicecom do not require a different result. *Denton Channel Two Foundation, Inc.*, 85 FCC 2d 983 (1981), involved the only reserved educational television channel assigned to the community, was decided before the current fee requirement was imposed, and involved a community group that had been active in trying to keep the channel in Denton. In *Halpern & Seltzer v. FCC*, No. 17988, 4 RR 2d 2036 (D.C. Cir. 1965), the court ordered the FCC, in essence, to start over with new applicants in light of the unique circumstances of that case. In *Las Americas Communications*, Inc., 6 FCC Rcd 1507 (1991), the reinstated applicants had dismissed their individual applications pursuant to a settlement agreement that was initially accepted but later rejected by the Commission because of questions going to the surviving applicant's basic qualifications. In *Webster-Fuller Communications Associates*, 5 FCC Rcd 3025 (ALJ 1990), the ALJ simply recited the fact that an applicant whose application was dismissed pursuant to a motion from other parties was reinstated for the purpose of facilitating a settlement agreement among it and two other applicants, all three of whom had actively participated in the proceeding. In

contrast, Spicecom is an irresolute applicant with qualifying issues outstanding against it, who would like the proceeding closed to all others if it is to participate.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re application of

BATON ROUGE MSA LIMITED PARTNERSHIP — File No. 07146-CL-MP-91

For facilities in the
Domestic Public Cellular
Radio Telecommunications Service
at Zachary, Louisiana,
Station KNKA268, Market No. 80-B

MEMORANDUM OPINION AND ORDER

Adopted: October 8, 1991; Released: October 18, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Baton Rouge MSA Limited Partnership (Baton Rouge) is the block B cellular carrier in the Baton Rouge Metropolitan Statistical Area (MSA). Baton Rouge Cellular Telephone Company (BRCTC or Petitioner) is the block A cellular carrier in the Baton Rouge MSA. BRCTC filed a Petition to Dismiss or Deny Baton Rouge's application for a new cell site at Zachary, Louisiana, in the northwest corner of the MSA. Baton Rouge filed an Opposition, and BRCTC filed a Reply. For the reasons set forth below, we grant Baton Rouge's application subject to compliance with the Commission's rules as set forth herein.

II. DISCUSSION

2. Baton Rouge's application proposes a 39 dBu contour which extends into two adjacent Rural Service Areas (RSAs), Louisiana 5 and Louisiana 7. Baton Rouge contracted with the block B carriers in the Louisiana 5 and 7 RSAs for permission to extend its service contours into their areas.

3. In its Petition, BRCTC argues that Baton Rouge must provide roamer service in the contour extensions for the Commission to grant its modification application. BRCTC claims that its subscribers, passing through the contour extensions, will not have the cellular roamer service that everyone else will have. It argues that Baton Rouge's failure to provide this roaming service violates Section 22.911(b) of our rules.[1] BRCTC requests that we either dismiss Baton Rouge's application or grant it with the following condition:

> The grant of this application is subject to and conditioned upon Baton Rouge MSA Limited Partnership providing roamer service to the cellular subscriber units of Baton Rouge Cellular Telephone Company within the authorized 39 dBu contour extensions into the Louisiana 5 - Beauregard and Louisiana 7 - West Feliciana RSAs.

4. In its Opposition, Baton Rouge challenges BRCTC's standing to file a petition because there is a contract permitting it to provide service in the challenged contour extension. It also claims that the Section 22.911(b) roaming requirement is irrelevant to our evaluation of its application. In addition, Baton Rouge argues that the Commission has not required home roaming so it should not be required to provide roaming to BRCTC's customers in or out of the MSA. Baton Rouge asserts that it may not provide either home cellular service or roaming in the extension areas because that area is not part of Baton Rouge's CGSA. Finally, Baton Rouge denies that its customers are roamers in the extension areas.

5. The Commission permits 39 dBu contour extensions into adjacent service areas if the licensee of the adjacent area agrees. *Orange County-Poughkeepsie Limited Partnership*, 3 FCC Rcd 1191 (Mob.Serv.Div. 1988). This policy, however, does not insulate applications from petitions to deny filed by interested parties who believe that the Commission's rules have been violated. We, therefore, reject Baton Rouge's challenge to BRCTC's right to file in this case.

6. Section 22.911(b) of the rules, which generally requires licensees to provide roamer service, does not excuse licensees from providing roamer service in contour extensions outside their home markets when the contour extension are permitted by a contract. If the RSA licensees in Louisiana 5 and Louisiana 7 were to provide the cellular service at issue in this case, they would be required to provide roaming to BRCTC's customers.[2] 47 CFR §22.911(b). The Commission's goal is to provide nationwide seamless cellular coverage to the public. *Domestic Public Cellular Radio Communications Service*, 49 Rad. Reg. 2d 809 (1981). "In establishing policies for cellular service we have intended to serve the public interest by implementing a nationwide high-capacity mobile communications service capable of providing both local and roaming mobile telephone users the ability to place and receive calls." *Id.* We find that the condition requested by BRCTC will further our policy of providing nationwide seamless cellular service to the public.

7. Accordingly, we require that Baton Rouge provide cellular roaming service in the areas of its contour extensions into the Louisiana 5 and Louisiana 7 RSAs. By this finding, we need not address further Baton Rouge's remaining contentions.[3]

III. ORDERING PARAGRAPHS

8. IT IS HEREBY ORDERED THAT the application filed by Baton Rouge MSA Limited Partnership is GRANTED subject to the following condition:

> The grant of this application is subject to and conditioned upon Baton Rouge MSA Limited Partnership providing roamer service to the cellular subscriber units of Baton Rouge Cellular Telephone Company within the authorized 39 dBu contour extensions into the Louisiana 5 - Beauregard and Louisiana 7 - West Feliciana RSAs.

9. IT IS FURTHER ORDERED THAT the Petition to Deny filed by Baton Rouge Cellular Telephone Company is GRANTED IN PART, as set forth above.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Section 22.911(b) requires a cellular carrier to provide roaming service to all subscribers of other properly licensed cellular carriers.

[2] Baton Rouge and the Louisiana 5 block B carrier could agree that Baton Rouge's customers would not to be treated as roamers in the Louisiana 5 market. The Louisiana 5-B carrier still would have to provide roaming to anyone else passing through the market. 47 CFR §22.911(b). Baton Rouge could not contract with the Louisiana 5-B carrier to prevent the Louisiana 5-B carrier from providing roaming service to BRCTC's customers who pass through the Louisiana 5 RSA.

[3] Section 22.20(a)(2) requires that we consider an applicant's compliance with all pertinent rules, even in the context of a modification application. We, therefore, reject Baton Rouge's argument that its alleged non-compliance with Section 22.911(b), the roaming rule, is irrelevant to our consideration of its modification application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Reconsideration concerning
Liability of Evergreen Media
Corporation of Chicago AM, Licensee
of WLUP(AM), Chicago, Illinois

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: October 10, 1991; Released: October 18, 1991

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration a Petition for Reconsideration of the Mass Media Bureau's order issued January 28, 1991, finding Evergreen Media Corporation of Chicago AM ("Evergreen"), licensee of WLUP(AM), Chicago, IL, in violation of 18 USC § 1464 (prohibiting indecent broadcasts) and imposing a monetary forfeiture in the amount of $6,000.[1]

2. In its Petition for Reconsideration,[2] Evergreen argues, first, that the statute of limitations bars imposition of a forfeiture for the two broadcasts of August 19, 1987. Second, it argues that the material in all three broadcasts does not meet the Commission's definition of indecency. And third, it argues that the Commission's application of sanctions in these instances, even if the material were indecent, is inappropriate.

3. In analyzing Evergreen's argument that Commission action is time-barred, the following dates are significant. On November 30, 1989, the Commission notified Evergreen of its apparent liability for a monetary forfeiture of $6,000 for broadcasting indecent material on August 19, 1987, and on March 30, 1989. Thus, with respect to each broadcast, the notice was issued within three years of its occurrence. On December 1, 1989, one day after the notice of apparent liability, WLUP's new license term commenced. On January 28, 1991, the Commission rejected Evergreen's arguments against imposition of a forfeiture and issued the subject forfeiture order.

4. Evergreen, arguing that the forfeiture order "plainly misreads" Section 503(b)(6) of the Communications Act of 1934, states "[i]t misconstrues the plain meaning of the statute by adding words and a concept not included in the statute or intended by Congress." The focus of the statute, asserts Evergreen, is the date of imposition of the forfeiture, reflecting "the intent of Congress that the Commission not be entitled to impose forfeiture penalties for actions that occurred in any but the last part of the prior license term." Thus, according to Evergreen, the Commission's focus on the date of the notice of apparent liability, rather than the date of the forfeiture order, is a clear error of law.

5. The language in question (which we recognize is not a model of clarity)[3] is read by Evergreen to provide that a forfeiture proceeding initiated by notice in a timely manner during one license term can become ineffectual if a new license term commences afterwards. Evergreen asserts that, irrespective of notice, the Commission cannot *impose* a forfeiture for a violation more than one year old in a previous license term, because it is limited by a "one-year look-back period [that] rolls with the new license term." We disagree. We read the time limits of Section 503(b)(6) to apply strictly to the issuance of notice and not to the later stages of a forfeiture proceeding or to a license term subsequently commencing. Evergreen's reading distorts the language of the statute to make the final reference to notice ("so long as such violation occurred within 3 years prior to the date of issuance of such required notice") entirely without purpose or applicability. *Notice* must be presumed to be the determinative factor and the focal point in the statutory scheme,[4] whether the violation occurred in a prior term or in a current term. Accordingly, a restatement of the statute in positive rather than negative language would allow a forfeiture to be imposed against a broadcaster for (i) a violation occurring in a prior term as long as notice is provided within one year of that violation (notice presumably issued in the following term); or (ii) a violation occurring in a current term as long as notice is provided within three years of that violation (notice presumably issued in the same term). The new license term reduces the notice period from three years to one with respect to violations in the previous term.

6. Moreover, Evergreen's proposed interpretation would directly contradict the stated congressional intent of expanding the FCC's forfeiture authority from what it had been prior to the 1978 amendments to the Communications Act.[5] The Commission's forfeiture authority, until 1978, had been limited by the requirement that notice be issued within one year of the violation (in a previous or in a current license term). The forfeiture order, essentially the second stage in a forfeiture proceeding, could be issued after notice, after the one-year period, and after a new term had begun.[6] The 1978 amendments allowed the Commission to initiate forfeiture proceedings in some cases within three years of the alleged violation, but did not add new restrictions to the Commission's ability to act with respect to situations requiring notification within one year.[7] The Senate Report cited by Evergreen explains the 1978 amendment of the limitations period as follows: "[T]he FCC must issue a notice of forfeiture liability 1 year from the date on which the violation occurred, or within the current license term, whichever is the longer period, but not to exceed 3 years. . . . After that period, the Commission could not *begin* a forfeiture proceeding."[8] In view of this background, we believe that issuance of notice within the proper time frame meets the Section 503(b)(6) statute of limitations.[9]

7. The Commission's rule, 47 C.F.R. § 1.80, was intended to track the provisions of the 1978 statutory amendments.[10] Thus, the Commission's restatement of the statute in subsection 1.80(c), under the heading "Limits on the time when a proceeding may be initiated," should not be read to restrict the forfeiture authority granted by Congress. The time limits therein, consistent with the sinitiation of a proceeding by appropriate notice. Accordingly, a notice properly issued in a current term (i.e., within three years of the violation and before the new

term has begun) validly initiates a forfeiture proceeding and does not retroactively lose its validity once a renewal is granted and takes effect. Timely notice received by the licensee fulfills the general aims and purposes of Section 503(b) and those of limitation statutes in general -- to insure a fair opportunity to defend, to suppress stale claims, to avoid surprise to the parties and loss of evidence through lapse of time and memory.[11] The licensee, on notice that Commission action has been initiated with respect to an apparent violation less than three years old in a current license term, cannot claim a diminished ability to defend its position by reason of a license renewal taking effect thereafter.

8. Evergreen's arguments regarding the Commission's definition of indecency and its application to the broadcasts before us have been addressed previously in the forfeiture order. Evergreen asserts, however, that they were not addressed thoroughly, and that our conclusions were not fully explained. In particular, Evergreen contends that our indecency finding against its Vanessa Williams segment is inconsistent with our January 25, 1991, *Letter to Peter Branton*, 6 FCC Rcd 610 (1991) ("All Things Considered" news broadcast not indecent). Evergreen continues to ask for more guidance in applying the indecency policy, and asks at least that this matter be held in abeyance pending resolution of *Action for Children's Television v. FCC (ACT II)*, No. 88-1916 (D.C. Cir. Jan. 23, 1989).

9. Although the Circuit Court has recently remanded *ACT II* with instructions that the Commission define a "safe harbor,"[12] it has not questioned any of the precedents upon which we based our forfeiture order against WLUP. We continue to believe that the precedents cited in the forfeiture order fully support the imposition of a penalty and that our reasoning as explained in the forfeiture order needs no further elaboration. We will, however, specifically reject Evergreen's suggestion that WLUP's "Steve and Garry Show" (a talkshow assertedly containing political and social commentary), describing sexual activities as depicted in a *Penthouse* magazine, is contextually similar to National Public Radio's "All Things Considered" newscast about an underworld figure whose wiretapped conversations included expletives. Even if it had been argued that the "Steve and Garry Show" in question was comparable to a news program, the Vanessa Williams segment contained vulgar material presented in a pandering and titillating manner unlike anything found in the *Branton* case.

10. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed February 27, 1991, by Evergreen IS DENIED.

11. IT IS FURTHER ORDERED That Evergreen SHALL FORFEIT to the UNITED STATES OF AMERICA the sum of six thousand dollars ($6,000) for repeated violations of 18 USC § 1464.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] *See Memorandum Opinion and Order*, 6 FCC Rcd 502 (MMB, Jan. 28, 1991), which contains transcripts of the broadcasts at issue.

[2] Evergreen's Petition for Reconsideration, dated February 27, 1991, incorporates its October 10, 1989, response to the Commission's August 24, 1989, letter of inquiry, and its January 29, 1990, response to the Commission's November 30, 1989, notice of apparent liability.

[3] Section 503(b)(6) states in pertinent part that no forfeiture penalty "shall be determined or imposed" against a broadcast licensee if the violation charged occurred

> (i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or (ii) prior to the date of commencement of the current term of such license, whichever is earlier so long as such violation occurred within 3 years prior to the date of issuance of such required notice . . . .

[4] Section 503(b)(4) of the Communications Act provides further demonstration of Congress' overriding concern with notice as a prerequisite to a forfeiture:

> [N]o forfeiture penalty shall be imposed under this subsection against any person unless and until -- (A) the Commission issues a notice of apparent liability, in writing, with respect to such person; (B) such notice has been received by such person, or until the Commission has sent such notice to the last known address of such person, by registered or certified mail; and (C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed.

[5] The former Section 503(b)(3) read in pertinent part: "No forfeiture liability [against a broadcast licensee] shall attach for any violation occurring more than one year prior to the date of issuance of the notice of apparent liability . . . ."

[6] *See* also former 47 C.F.R. § 1.621.

[7] In its Order adopting new rules consistent with the 1978 amendments, the Commission stated, "The new law contains a more generous statute of limitations provision -- up to three years in the case of violations by broadcasters, and one year for others. The previous law required issuance of a notice of apparent liability within one year for violations by broadcast station licensees . . . ." *Implementation of P.L. 95-234 Forfeiture procedures*, 44 RR 2d 565, 566 (1978).

[8] S. Rep. No. 580, 95th Cong., 1st Sess. at 7 (1977) (emphasis added). The legislative history of the Commission's forfeiture authority from its inception (no such authority was granted until 1960) reveals an overriding congressional concern with the broadcaster's right to timely prior notification of an alleged violation before a monetary fine could be levied.

[9] Whether the forfeiture is ultimately collectible in a suit brought in the District Court by the Department of Justice, *see* 47 USC § 504, is determined according to the limitations of 28 USC § 2462, "Time for commencing proceedings," which states in pertinent part:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . .

[10] 44 RR 2d 565, 566, *supra*.

[11] 51 Am. Jur. 2d *Limitation of Actions* § 17.

[12] *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HEARTLINE COMMUNICATIONS, INC. File No. I-T-C-91-198

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 9, 1991; Released: October 18, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by Heartline Communications, Inc. (HCI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-198 IS GRANTED, and HCI is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1 between the U.S. and the international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 10, 1991

NOTICE OF INTENTION TO ISSUE DECLARATORY RULING WITH RESPECT TO EXCLUSIVE AUTHORITY OF FCC TO DETERMINE WHETHER BROADCASTERS HAVE VIOLATED LOWEST UNIT CHARGE REQUIREMENT OF SECTION 315(b)

COMMENT PERIOD ESTABLISHED

Comments due: October 21, 1991

The Commission is considering issuing on its own motion a declaratory ruling confirming its earlier conclusion that it has exclusive jurisdiction to determine questions of liability for violations of Section 315(b) of the Communications Act. News Release, Report No. GN-74, June 6, 1991. The Commission also is considering whether its exclusive jurisdiction should extend beyond the basic liability question and, if so, whether it should preempt any cause of action in which an alleged violation of Section 315(b) is an essential element. This *Public Notice* invites interested parties to comment on these issues by October 21, 1991.

Candidates for elective office in several states have sued broadcast stations, on various legal theories, for allegedly overcharging the candidates for political advertisements. The lawsuits, some of them in state courts and others in federal courts, are based ultimately on allegations that the stations charged the candidates more than the "lowest unit charge" or the charge for "comparable use" of the station -- standards that are set forth in Section 315(b) of the Communications Act and enforced by the Federal Communications Commission.

In one of these cases, the United States District Court for the Northern District of Georgia held that the Commission has exclusive jurisdiction to determine whether a station has violated Section 315(b).[1] The court held further that the Commission's procedures are the exclusive remedy for violations of Section 315(b). In particular, the court found that state court complaints brought by candidates against broadcasters for alleged violations of Section 315(b) present a federal question and noted that "enforcement of the [Communications Act] and vindication of the public interest are vested in the Federal Communications Commission."[2] Pointing to the "pervasive statutory and administrative scheme to enforce section 315," the court cited cases in which the Commission has ruled on candidates' complaints about overcharges and in which rebates have been ordered.[3] The court dismissed the complaints and held that the Commission provides candidates an exclusive remedy for violations of Section 315(b). That decision is now on appeal to the United States Court of Appeals for the Eleventh Circuit.[4]

In contrast, in a second case, the United States District Court for the Middle District of Alabama held that complaints filed in state court by political candidates against broadcasters for alleged advertising overcharges did not present a federal question warranting removal of the case by the defendants to federal district court.[5] That court held that the complaints were "essentially local to the state," even though resolution of the claims probably would require some application of federal statutes and regulations.[6] It accordingly remanded the case to the Alabama state court for further proceedings.

In the wake of that remand, the Commission appeared before the Alabama state court as *amicus curiae* and argued that the issue of whether a broadcaster had violated Section 315(b) was within the exclusive primary jurisdiction of the FCC and should be referred to the agency for determination. The Commission stated that consistency in the application and enforcement of Section 315(b) requires that the Commission in every instance make the basic liability determination in cases alleging overcharges for political advertisements. The Commission thus concluded that, in order to fulfill its own responsibilities under the Act, it must assert its exclusive primary jurisdiction to determine the question of liability.[7] *Compare Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984); *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988), *citing Fidelity Federal Savings and Loan Assn. v. De la Cuesta*, 458 U.S. 141, 154 (1982). Nonetheless, although the Alabama state court recognized the Commission's "strong interest" in enforcing Section 315(b), it has not referred the liability determination to the Commission and has not stayed its own proceedings to permit the agency to make such a determination.[8]

In view of the inconsistencies among these federal and state court decisions and the likely proliferation of similar suits in a number of jurisdictions, the Commission is now considering issuing a declaratory ruling to clarify its role in resolving these political broadcasting controversies. It accordingly requests comment on whether its jurisdiction to determine the lawfulness of political advertising charges is exclusive and whether federal and state courts must refer the liability question to the FCC in any case alleging that charges for political advertising are excessive. The Commission also seeks comments on whether its exclusive jurisdiction should extend beyond the basic liability question and, if so, whether the Commission should preempt any cause of action in any court in which an alleged violation of Section 315(b) is an essential element.[9]

Interested parties may file comments in this matter no later than October 21, 1991. Reply comments will not be accepted, and no extensions of this comment period are contemplated.

An original and four copies of all comments must be filed in accordance with Section 1.51(c) of the Commission's Rules. In addition, copies of each pleading must be filed as follows: one copy with the Downtown Copy Center (DCC), the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554; one copy with the Office of General Counsel, Room 614, 1919 M Street, N.W., Washington, D.C. 20554; and one copy with the Mass Media Bureau, Room 314, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of comments may be obtained from DCC. The documents will be available for public inspection and copying in Room 614, 1919 M Street, N.W.

For further information, contact Diane L. Hofbauer, Office of General Counsel, at (202) 632-7020.

FEDERAL COMMUNICATIONS COMMISSION

SEPARATE STATEMENT OF CHAIRMAN ALFRED C. SIKES AND COMMISSIONER ANDREW C. BARRETT ON NOTICE OF INTENTION TO ISSUE DECLARATORY RULING WITH RESPECT TO EXCLUSIVE AUTHORITY OF FCC TO DETERMINE VIOLATIONS OF SECTION 315(B) OF COMMUNICATIONS ACT

We have no objection to asking whether or not the Commission's exclusive jurisdiction can or should be "extend[ed] beyond the basic liability question" of whether there has been a violation of Section 315(b). However, we write to emphasize that asking this question should not be read as concluding that the Commission has the ability -- or should exercise that ability -- to totally preempt state or federal judicial proceedings with respect to both liability and damages in this area.

FOOTNOTES

[1] *Zell Miller for Governor, et al. v. Pacific and Southern Company*, Civil Action No. 1:91-CV-267-RLV (N.D. Ga.) (Order, released June 4, 1991).

[2] *Id.*, slip op. at 13, *quoting Belluso v. Turner Communications Corp.*, 633 F.2d 393, 397 (5th Cir. 1980).

[3] Slip op. at 13-14, *citing Hernstadt v.* FCC, 677 F.2d 893 (D.C. Cir. 1980); *Atlin Communications, Inc.*, 5 FCC Rcd 2835 (M.M.B. 1990); *Southern Arkansas Radio Co.*, 5 FCC Rcd 4643 (M.M.B. 1990).

[4] No. 91-8561 (11th Cir., filed June 27, 1991).

[5] *William Dickinson v. Cosmos Broadcasting Co.*, Civil Action No. 91-T-072-N (M.D. Ala.) (Order, released April 1, 1991).

[6] *Id.*, slip op. at 17.

[7] This exclusive jurisdiction over Section 315(b) liability determinations, moreover, must be recognized by both federal and state courts.

[8] *See William L. Dickinson v. Cosmos Broadcasting Co.*, Circuit Court for Montgomery, Alabama, Case No. CV-91-67-P (Order, released September 23, 1991). It was "significant" to the state court that the Commission "has not taken a position here that the claims of the Plaintiffs are preempted by the Communications Act." Slip op. at 3. That order denied motions to dismiss, filed by the defendants, arguing that state court actions for overcharges for political advertising were preempted. The defendants have asked the Alabama Supreme Court to review the denial of their motions to dismiss.

[9] In this regard the Commission believes it would be advisable for courts to stay any ongoing proceedings pending the issuance of any declaratory ruling as a result of this notice.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 91-225
38206

In the Matter of	)	
	)	
Station KROQ-FM	)	MM Docket No. 91-214
Pasadena, California	)	

ORDER

Adopted: July 3, 1991 Released: July 17, 1991

By the Commission:

1. The Commission has under consideration information submitted by Infinity, Inc., licensee of Station KROQ-FM, Pasadena, California, in response to a Commission inquiry about KROQ-FM's broadcast of a hoax murder confession, as well as additional information developed in an ongoing staff investigation. This information raises substantial questions of fact requiring further and more formal investigation in order to develop a record fully considering all aspects of Infinity, Inc.'s, activities and control as they relate to the broadcast, the response, and the licensee's exercise of control over KROQ-FM's operations. See Section 403 of the Communications Act of 1934, as amended.

2. ACCORDINGLY, IT IS ORDERED, that, pursuant to Section 5(c)(1) of the Communications Act of 1934, as amended, for the purpose of this inquiry authority is hereby delegated to the Chief Administrative Law Judge of the Commission to require by subpoena the production of books, papers, correspondence, memoranda and other records deemed relevant to this inquiry; to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence; and to perform such other duties in connection therewith as may be necessary or appropriate to the compilation of a complete record concerning the subject matter of this inquiry.

3. IT IS FURTHER ORDERED, that the Chief Administrative Law Judge is specifically authorized to designate a Commission Administrative Law Judge to exercise the authority conferred by this Order, and to require witnesses to testify and produce evidence under authority of, and in the manner provided in, Section 409 of the Communications Act of 1934, as amended when requested to do so by Commission Counsel.

4. IT IS FURTHER ORDERED, that the subpoena power delegated by this Order shall be exercised in accordance with Sections 1.331 through 1.340 of the Commission's Rules. Motions to quash or limit subpoena shall be directed to the presiding Administrative Law Judge in accordance with Section 1.334 of the Rules.

5. IT IS FURTHER ORDERED, that the provisions of Section 1.27 of the Commission's Rules shall apply to the production of oral and documentary evidence under subpoena.

6. IT IS FURTHER ORDERED, that the presiding Administrative Law Judge is directed to complete the investigation as expeditiously as possible so that a final staff report to the Commission can be submitted at the earliest practicable date.

7. IT IS FURTHER ORDERED, that the investigation conducted pursuant to 47 U.S.C. § 403 and this Order shall be non-public.

8. IT IT FURTHER ORDERED, that upon conclusion of the inquiry ordered herein the presiding Administrative Law Judge shall certify the record thereof to the Commission for appropriate action.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 91-1201

In the Matter of	)	
	)	
Amendment of Part 2 of the Rules	)	
Concerning the Importation of	)	Gen. Docket No. 89-349
Radio Frequency Devices Capable of	)	
Causing Harmful Interference	)	

ORDER

Adopted: September 24, 1991 Released: September 30, 1991

By the Chief, Field Operations Bureau

1. On August 29, 1991, Apple Computer, Inc.; Matsushita Electric Corporation of America; Memorex Telex Corporation; Sony Corporation of America, Texas Instruments Incorporated; and Zenith Data Systems, by their respective attorneys, together with the Computer and Business Equipment Manufacturers Association, filed a joint request that the Commission extend the date for filing reply pleadings to petitions for reconsideration filed in the above-captioned proceeding. They assert that in light of their substantial agreement on the principal issues in the docket, they believe that they may be able to prepare, within 30 days, a Consolidated Reply setting forth a unified position on specific proposals for modification and clarification of new Section 2.1204 of the Rules. They further assert that grant of their request would serve the public interest by increasing the probability of conserving Commission resources and expediting resolution of this proceeding.

2. The requesters provided certification that they had served a copy of their request upon all appropriate parties.

3. While we do not routinely grant extensions of time, we believe that the public interest in the development of a full and complete record in this proceeding would be best served and the maximum amount of useful participation by interested parties gained by allowing additional time for the filing of replies. Thus, we conclude that it is appropriate to extend the date for filing replies to thirty (30) days from the date of adoption of this order.

4. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.111 and 0.311 of the Commission's Rules, 47 C.F.R. 0.111 and 0.311, that the joint

request for extension of time IS GRANTED, and that reply comments in this proceeding ARE TO BE FILED on or before October 24, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

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